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# FIFTH REPORT ON STATE RESPONSIBILITY

by

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## FOREWORD

The present report consists of two chapters, the first of which addresses the subject matter of Part Three of the draft articles on State responsibility (Implementation) while the second deals with the consequences of delinquencies qualified as "crimes" of States under article 19 of Part One of the draft articles. Chapter I also contains the text of proposed draft articles and an Annex on the settlement of disputes. Chapter II does not contain any draft articles for the reasons indicated at the outset of that chapter.

Although the subject matters of chapters I and II are treated separately, it will be shown that the degree of availability of dispute settlement procedures and the chances of a proper implementation of the consequences of crimes are more closely interrelated than may appear at first sight.

## CHAPTER I.

## PART THREE OF THE DRAFT ARTICLES ON STATE RESPONSIBILITY: DISPUTE SETTLEMENT PROCEDURES

1. Section I of this chapter contains a summary of the 1985-1986 proposals of the previous Special Rapporteur relating to the settlement of disputes (draft articles 3-5 of Part Three as proposed by him in 1986, and of the debates of the Commission and of the Sixth Committee thereon. Section 2 analyses the features of countermeasures as an indispensable means of implementation of State responsibility, on the basis of the important debates on the subject held in the Commission and in the Sixth Committee in 1991-1992 and in 1984-1986. Section 3 sets forth the consequences to be drawn from the nature of countermeasures and the statements on the subject made in the course of the said debates for the purposes of the choices that the Commission is called upon to make with regard to the dispute settlement provisions of Part Three of the draft. Section 4 describes the solutions recommended by the Special Rapporteur in the light of the positive impact they could have on the regime of countermeasures and the proper implementation of the law of State responsibility in general. Section 5 discusses the Commission's practice with regard to the dispute settlement provisions to be embodied in its drafts in the light of the requirements of the progressive development of the law in the area of State responsibility. Section 6 lays down the proposed draft articles of Part Three and the Annex thereto.

## SECTION 1

## THE DRAFT ARTICLES ON DISPUTE SETTLEMENT DISCUSSED IN THE COMMISSION AT ITS THIRTY-SIXTH AND THIRTY-SEVENTH SESSIONS AND IN THE SIXTH COMMITTEE AT THE FORTIETH AND FORTY-FIRST SESSIONS OF THE GENERAL ASSEMBLY

### A. Professor Riphagen's proposals

2. The dispute settlement provisions proposed by our predecessor were designed to come into operation at the phase where, in the words of his draft article 3, objections had been raised against measures taken or intended to be taken under the articles of Part Two providing for the right of an allegedly injured State to resort to countermeasures (namely, draft articles 8 and 9 of Part Two as proposed by the same Special Rapporteur).

3. Under draft article 3, paragraph 1, "[I]f objection has been raised against measures taken or intended to be taken under article 8 or article 9 of part 2 of the present articles by the State alleged to have committed the internationally wrongful act or by another State claiming to be an injured State in respect of the suspension of the performance of the relevant obligations, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations". Under paragraph 2, however, "(N)othing in the foregoing paragraph shall affect the rights and obligations of States under any provisions in force binding those States with regard to the settlement of disputes". 1/ In case no solution could be reached on the basis of the procedures referred to in article 3, three kinds of procedures were envisaged under subparagraphs (a), (b) and (c) of article 4.

4. Subparagraph (a) provided that disputes concerning the interpretation or application of the provision of Part Two prohibiting countermeasures consisting in the violation of an obligation deriving from a "peremptory norm of general international law" could be submitted unilaterally by any one of the parties to the ICJ for a decision. 2/

5. Subparagraph (b) provided for the same possibility in relation to disputes concerning the "additional rights and obligations" envisaged as

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1/ Seventh Report on State Responsibility by Mr. William Riphagen, hereinafter cited as "seventh report", (Yearbook of the International Law Commission, 1986, vol. II (Part One), document A/CN.4/397 and Add.1, p. 4).

2/ See the text of article 4 (ibid., pp. 4-5).

consequences of international crimes of States by the relevant provision of Part Two (namely article 14 as proposed by Professor Riphagen). 3/

6. Subparagraph (c) dealt with the more general category of disputes concerning the application or interpretation of the provisions of Part Two relating to the regime of countermeasures (namely, articles 9 to 13 of that Part, as proposed by Mr. Riphagen). As regards these disputes, either party was entitled under subparagraph (c) to resort to a conciliation procedure - provided for in an Annex to the articles - by submitting a request to that effect to the Secretary-General of the United Nations.

7. Since, for the reasons he has indicated on many occasions, the present Special Rapporteur is not ready yet to make definite suggestions to the Commission relating to what Professor Riphagen refers to in his article 4 (b) as "additional rights and obligations" attaching to the internationally wrongful acts contemplated in article 19 of Part One of the draft articles, we are not concerned here, for the time being, with the provision of subparagraph (b).

B. The debates in the Commission and in the Sixth Committee

8. The comments of the members of the Commission and those made in the Sixth Committee on the proposals referred to above can be classified under five headings according to whether they relate to:

(a) the general, preliminary problem whether dispute settlement provisions should be included in the draft;

(b) the relationship between the dispute settlement procedures to be provided for in the draft and any dispute settlement arrangements in force between the parties;

(c) the nature of the settlement procedures according to:

(i) the stage of implementation of the responsibility relationship at which the said procedures should come into play;

(ii) the extent to which resort thereto should be compulsory;

(iii) the binding or non-binding nature of their outcome;

(d) the provisions of the draft (substantive or instrumental) to which the envisaged procedures should apply;

(e) the question of reservations.

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3/ Ibid.

1. The general problem

9. To the general preliminary question whether dispute settlement provisions should be included in the draft, some members gave an affirmative answer. 4/

10. Some members pointed out that a convention on State responsibility would be incomplete and ineffective without a compulsory procedure for the settlement of certain disputes. 5/ Others thought that the absence of a compulsory dispute settlement procedure in the convention would be unacceptable to governments. 6/ One way or the other, clearly a careful balance would have to be struck between, on the one hand, the necessity "to prevent nullification or diminution of the purpose and effectiveness of the future convention through lack of effective procedure for dispute settlement, and, on the other hand, (the necessity) to avoid reducing the acceptability of the future convention by making the dispute-settlement regime too rigid". 7/ Others affirmed, on the contrary, that the Special Rapporteur's proposals with respect to Part Three would inevitably provoke disagreement within the Commission and observed that in the case of the 1969 Vienna Convention on the Law of Treaties, the Commission had left the delicate problem of the inclusion of a dispute settlement procedure to the plenipotentiary conference. 8/

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4/ Mr. McCaffrey at the 1892nd meeting (Yearbook ... 1985, vol. I, p. 99, para. 27); Mr. Al Qaysi at the 1899th meeting (ibid., p. 143, para. 9); Mr. El Rasheed Mohamed Ahmed at the 1900th meeting (ibid., p. 152, para. 39); and Mr. Yankov at the 1899th meeting (ibid., p. 146, para. 44).

5/ Mr. Calero Rodrigues at the 1892nd meeting (ibid., p. 101, para. 46); Mr. Huang at the 1894th meeting (ibid., p. 10, para. 8); and Mr. Mahiou at the 1897th meeting (ibid., p. 130, para. 21).

6/ Sir Ian Sinclair at the 1895th meeting (ibid., p. 118, para. 15). Mr. Arangio-Ruiz, speaking at the 1900th meeting (ibid., p. 150, para. 24), observed that some States would support a draft without a compulsory dispute settlement procedure, while others "would be reluctant to accept any codification or progressive development of the law in such a sensitive area without an adequate system of implementation and peaceful settlement." He, therefore, held that the Special Rapporteur should draft articles based on section II of his sixth report.

7/ Mr. Huang at the 1894th meeting (ibid., p. 110, para. 8). Similarly, Mr. Calero-Rodrigues at the 1892nd meeting (ibid., p. 101, para. 46).

8/ Mr. Reuter at the 1891st meeting (Yearbook ... 1986, vol. I, p. 92, para. 8).

11. During the corresponding debate in the Sixth Committee, Brazil characterized the elaboration of Part Three as a delicate task and only reluctantly agreed that a Part Three would be necessary. 9/ The Federal Republic of Germany, Jamaica, Greece, Nigeria, Cyprus, New Zealand, Spain, Somalia, Tunisia and Kenya supported the incorporation of mandatory dispute settlement procedures. 10/ Ethiopia, China, Australia and Morocco held that caution should be exercised in the elaboration of Part Three in view of the reluctance of States to submit to compulsory third-party settlement procedures. 11/

2. Relationship between the proposed procedures and any dispute settlement arrangements in force between the parties

12. With regard to the relationship between the dispute settlement procedures to be provided for the draft and any dispute settlement arrangements in force between the parties (article 3, paragraph 2 of Mr. Riphagen's draft), one member emphasized that article 3 should make it clear that priority was to be given to procedures in force between parties to a dispute. 12/ Some other members thought that the provision in paragraph 2 of article 3 should also qualify article 4. 13/

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9/ See/A/C.6/40/SR.23, para. 60.

10/ See, respectively, A/C.6/40/SR.24, para. 13; A/C.6/40/SR.24, para. 32; A/C.6/40/SR.25, paras. 39, 40; A/C.6/40/SR.26, paras. 36, 37; A/C.6/40/SR.27, para. 16; A/C.6/40/SR.32, para. 70; A/C.6/40/SR.31, para. 8; A/C.6/40/SR.32, para. 70; A/C.6/40/SR.35, para. 45); A/C.6/40/SR.33, para. 6; and A/C.6/40/SR.36, para. 15.

11/ See, respectively, A/C.6/40/SR.27, para. 57; A/C.6/40/SR.30, para. 79; A/C.6/40/SR.31, para. 24; and A/C.6/40/SR.36, para. 27.

12/ Mr. Ogiso at the 1954th meeting (Yearbook ... 1986, vol. I, p. 69, para. 23).

13/ Sir Ian Sinclair at the 1953rd meeting (ibid., p. 66, paras. 38, 39). According to Sir Ian, in other words, the clause of paragraph 2 of article 3 (which preserves the dispute settlement rights and obligations in force between the parties) should apply not only to the provision of paragraph 1 of article 3 (means of settlement indicated in Article 33 of the Charter) but also to the rights and obligations provided for under article 4 (a), (b) and (c). At the 1954th meeting, Mr. Lacleta Munoz stressed that "nothing should be allowed to prevent disputes from being unilaterally submitted to the ICJ as provided for in article 4, subparagraphs (a) and (b) (ibid., p. 68, para. 14).

### 3. Nature of the settlement procedures

13. With respect to the nature of the settlement procedures, one must distinguish various aspects which members of the Commission have addressed.

14. One of these aspects concerns the stage at which the envisaged settlement procedures relating to the implementation of the responsibility relationship should come into play. 14/ According to one member, the scope of the reference, in draft article 3, to the application of the optional procedures provided for in Article 33 of the Charter should have been wider; 15/ it could encompass for instance articles 10-13 of Part Two of the draft 16/ or the whole of Part Three. 17/ Some other members furthermore held that reference should also have been made to article 8 of Part Two, 18/ or even to articles 6 and 7 of Part Two. 19/

15. Another point concerns the extent to which resort to the envisaged procedures should be compulsory. Mr. Riphagen had expressed, in both his sixth and seventh reports, the intention to seek inspiration from the relevant

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A similar view was expressed by Mr. Riphagen in his sixth report, considering that also provisions of Part Two have such a residual character (see Yearbook ... 1985, vol. II (Part One) document A/CN.4/389, p. 16, paras. 16-18). This opinion was shared, in particular, by Sir Ian Sinclair (ibid., vol. I, p. 118, para. 15).

14/ This issue was considered of fundamental importance with respect to the question of the interrelations between the various parts of the draft articles by Mr. McCaffrey at the 1953rd meeting (Yearbook ... 1986, vol. I, p. 63, para. 9).

15/ Mr. Yankov at the 1954th meeting (ibid., p. 75, para. 45).

16/ Mr. Jagota at the 1955th meeting (ibid, p. 73, para. 18).

17/ Mr. Koroma at the 1955th meeting (ibid. p. 75, para. 36).

18/ Mr. Reuter at the 1953rd meeting (ibid., p. 64, para. 22); Mr. Ogiso at the 1954th meeting (ibid., p. 69, para. 27); Mr. Yankov at the 1954th meeting (ibid., p. 71, para. 43); Mr. Jagota at the 1955th meeting (ibid., pp. 73-74, para. 18); and Mr. Razafindralambo at the 1956th meeting (ibid., p. 79, para. 7).

19/ Mr. Ogiso, at the 1954th meeting (ibid., p. 69, para. 27); and Mr. Yankov at the 1954th meeting (ibid., p. 71, para. 43).

provisions on settlement procedures contained in other Conventions. 20/ Some members welcomed this suggestion. 21/ The approach taken by Mr. Riphagen in his sixth report was widely approved, 22/ although a few members stressed that States could be reluctant to include a compulsory dispute settlement procedure in Part Three of the draft. 23/ Some members, on the other hand, were utterly opposed to the introduction of a compulsory procedure for the settlement of disputes. 24/ It should in any case be

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20/ These views are developed particularly in Mr. Riphagen's sixth report dealing with "the content, forms and degrees of international responsibility (part 2 of the draft articles); and Implementation (mise en oeuvre) of international responsibility and the settlement of disputes (part 3 of the draft articles)" (hereinafter cited as "sixth report") (Yearbook ... 1985, vol. II (Part One), document 4/CN.4/389, p.16, paras. 9-11, 13). An explicit reference to the relevant provisions of the 1969 Vienna Convention on the Law of Treaties (article 65 and 66) is contained in the commentaries to articles 3 and 4 (see seventh report, Yearbook ... 1986, vol. II (Part One), document A/CN.4/389, pp. 4-5).

21/ Mr. Koroma at the 1900th meeting (Yearbook ... 1985, vol I, p. 153, para. 49); Mr. Jagota at the 1901st meeting (ibid., p. 156, para. 19) and Mr. Huang at the 1894th meeting (ibid., p. 110, para. 8) agreed that use should be made of existing codification instruments. According to Mr. Huang, however, "no particular model should be adopted to the exclusion of others". Other members indicated more directly that the Special Rapporteur was correct to proceed on the basis of an analogy with the 1969 Vienna Convention, for instance Mr. Sucharitkul at the 1890th meeting (ibid,. p. 91, para. 44); Mr. Calero-Rodrigues at the 1892nd meeting (ibid., p. 101, para. 46); and Mr. Razafindralambo at the 1898th meeting (ibid., p. 137, para. 25).

22/ Mr. Calero-Rodrigues at the 1892nd meeting (ibid., p. 101, para. 46); Sir Ian Sinclair at the 1895th meeting (ibid., p. 118, para. 15); Mr. Barboza at the 1897th meeting (ibid., p. 132, para. 40); Mr. Lacleta Munoz at the 1899th meeting (ibid., p. 45, para. 31); Mr. Mahiou at the 1897th meeting (ibid., pp. 129-130, para. 21); and Mr. Reuter at the 1891st meeting (ibid., p. 92, para. 4).

23/ Mr. Calero-Rodrigues at the 1892nd meeting (ibid., p. 101, para. 45); Mr. Huang at the 1894th meeting (ibid., p. 110, para. 8); Mr. Mahiou at the 1897th meeting (ibid., p. 130, para. 21); and Mr. Arangio-Ruiz at the 1900th meeting (ibid., p. 150, para. 24).

24/ Mr. Balanda at the 1894th meeting (ibid., p. 115, para. 52); Mr. Njenga at the 1896th meeting (ibid., p. 125, para. 32); and Mr. Flitan at the 1893rd meeting (ibid., p. 105, para. 16). Mr. Flitan expressed concern that such an approach would jeopardize the future convention and felt that in view of the importance of the draft articles to the international community it would be wiser to display moderation with regard to the implementation of

stressed that, in view of the reluctance of States to be bound by third-party settlement procedures, the mere reference in article 3, paragraph 1 of Part Three of the draft to Article 33 of the United Nations Charter was welcomed by various members of the ILC. 25/ With regard to the "substance" of the mechanism proposed by Mr. Riphagen, one member of the Commission considered the Special Rapporteur's proposals with respect to ordinary internationally wrongful acts to be broadly acceptable. 26/

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international responsibility. Mr. Balanda held that although a roof to the project in the form of a dispute settlement procedure would be necessary, ad hoc arrangements were probably better since "States were more and more mistrustful of compulsory jurisdiction as such, so that rather than suggest too binding a mechanism, it would be better to suggest a flexible system that would encourage the States parties to the dispute to come together in order to seek a solution."

25/ Including Mr. Calero-Rodrigues at the 1953rd meeting (Yearbook ... 1986, vol. I, p. 65, para. 32); Sir Ian Sinclair at the 1953rd meeting (ibid., p. 65, para. 38); Mr. Sucharitkul at the 1954th meeting (ibid., p. 67, para. 5); Mr. Huang at the 1954th meeting (ibid., p. 70, para. 31); Mr. Francis at the 1955th meeting (ibid., p. 77, para. 56); and Mr. Jacovides at the 1955th meeting (ibid., p. 78, para. 64). Mr. Sucharitkul pointed out that the means of peaceful settlement enumerated in Article 33 of the Charter were not limitative and that use could also be made of "good offices". Mr. Huang thought that, in conformity with State practice, direct negotiations should be emphasized; Mr. Arangio-Ruiz, speaking at the 1966th meeting, held it possible to state in article 3 or in the commentary thereto which of the means of settlement provided in Article 33 were considered to be the most appropriate (ibid., p. 73, para. 11).

26/ Mr. McCaffrey at the 1953rd meeting (ibid., p. 63, para. 7). Mr. Tomuschat, on the other hand, observed at the 1955th meeting (ibid., p. 74, paras. 22-23) that the possibility unilaterally to set in motion the compulsory conciliation procedure would result in a metamorphosis in international law; the question was whether it would be acceptable to States . He and Mr. Malek agreed that it was important not to lose sight of what could reasonably be achieved. Mr. Malek added at the 1952nd meeting (ibid., p. 59, paras. 14-16) that the many inquiry and conciliation structures set up outside the framework of the United Nations were rarely used as States preferred to submit their disputes to the principal organs of global or regional organizations so as to be able to win public support for their case. In his sixth report, Mr. Riphagen had expressed the view that the alleged injured State "cannot force the alleged author State to submit to a dispute-settlement procedure concerning the alleged breach, which may or may not be agreed between them ... only the alleged author State should be empowered to set into motion the procedure of dispute settlement to be provided for in part 3 of the draft articles". (Yearbook ... 1985, vol. II (Part One), p. 17, para. 20). This is contrary to the approach reflected in article 42 together with articles 65 and 66 of the Vienna Convention on the Law of Treaties pursuant to

16. During the debate in the Sixth Committee, States also expressed their position on the matter. Some 27/ supported the inclusion of mandatory dispute settlement procedures - particularly with regard to the delicate aspects of the draft which could hardly be left to Member States to judge for themselves - even though the question was asked whether such systems would best serve the interests of the international community. 28/ Other States were more reserved. They insisted that caution should be exercised in the elaboration of Part Three in view of the reluctance of States to submit to compulsory third-party settlement procedures. 29/ In the opinion of many other States, the general orientation and particularly the provisions of article 4 were unacceptable as they did not respect the principle of freedom of choice of dispute settlement means. 30/

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which both parties to the dispute may set into motion the dispute settlement procedure provided for in the Convention. Mr. Calero-Rodrigues specifically approved, at the 1892nd meeting (ibid., vol. I, p. 101, para. 46), of the approach taken by the Special Rapporteur which placed the author State in the position of having to take the initiative of applying the compulsory conciliation procedure. With regard to the same aspect, Mr. Tomuschat, speaking at the 1955th meeting (ibid., p. 75, paras. 29-30), held that, in so far as such restrictive interpretation was possible of article 4 (a) and (b), an unwarranted imbalance would result (because of the fact that only the alleged author State could file an application with the Court) which could moreover, "place the ICJ in a very embarrassing situation".

27/ Including the Federal Republic of Germany (A/C.6/40/SR.24, para. 13); Jamaica (A/C.6/40/SR.24, para. 32); Greece (A/C.6/40/SR. 25, paras. 39-40); Nigeria (A/C.6/40/SR.26, paras. 36,37); Cyprus (A/C.6/40/SR.32, para. 70); Somalia (A/C.6/40/SR.35, para. 45); Tunisia (A/C.6/40/SR.33, para. 6); Austria (A/C.6/40/SR.33, para.55); and Kenya (A/C.6/40/SR.36, para. 15).

28/ Jamaica (A/C.6/40/SR.24, para.32). The German Democratic Republic (A/C.6/40/SR.25, para. 21) and Hungary (A/C.6/40/SR.30, paras. 21, 22) held that settlement procedures should not be limited to compulsory ones only and that room should be made for instance to negotiated settlement.

29/ This opinion was shared by Ethiopia (A/C.6/40/SR.27, para. 57), China (A/C.6/40/SR.30, para. 79), Australia (A/C.6/40/SR.31, para. 24) and Morocco (A/C.6/40/SR. 36, para. 27). During the debates relating to the proposals worked out in Mr. Riphagen's seventh report, Morocco (A/C.6/41/SR.36, para. 31) and New Zealand (A/C.6/41/SR.44, para. 52) agreed with compulsory conciliation.

30/ Hungary (A/C.6/41/SR.34, para. 34) pointed out that many States had neither ratified the 1969 Vienna Convention, nor accepted the optional clause of Article 36 (2) of the Court's Statute. See also Czechoslovakia

17. The binding or non-binding nature of the procedure's outcome has also been the subject of discussion in the Commission. The proposal for a limited compulsory jurisdiction of the ICJ for determining whether there was a rule of jus cogens applicable to the breach in question (article 4 (a)) or whether an international crime had been committed (article 4 (b)) 31/ provoked a variety of reactions in the Commission. Some members supported the ICJ's compulsory jurisdiction as provided in article 4 (a) and (b). 32/ It was argued in this connection that due to the changes in its composition, that Court had shed its conservative image and had become more acceptable to a larger number of States. 33/

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(A/C.6/41/SR.34, para. 47), the German Democratic Republic (A/C.6/41/SR.36, paras. 37, 40, 41), Romania (A/C.6/41/SR.36, para 73), the Ukrainian Soviet Socialist Republic (A/C.6/41/SR.37, para. 60), Ethiopia (A/C.6/41/SR.38, para. 22), Morocco (A/C.6/41/SR.38, para. 31), Bahrain (A/C.6/41/SR.38, para. 66), Bulgaria (A/C.6/41/SR.38, paras. 87-89), China (A/C.6/41/SR.39, para. 28), Israel (A/C.6/41/SR.41, para. 93), France (A/C.6/41/SR.41, para. 43), Venezuela (A/C.6/41/SR.43, para. 16) and Kuwait (A/C.6/41/SR.43, para. 34). Iraq held that compulsory conciliation was not always an effective means (A/C.6/41/SR.34, para. 60).

31/ This approach taken by Mr. Riphagen at the 1952nd meeting (Yearbook ... 1986, vol. I, p. 61, para. 37) and at the 1956th meeting (ibid., p. 83, paras. 41, 44) resembles the suggestion made by Mr. McCaffrey who, while not convinced of the merit of compulsory jurisdiction of the Court said, at the 1953rd meeting (ibid., p. 62, para. 5), that he would prefer it to be "limited to determining whether a rule of jus cogens or an international crime was involved in a dispute". Mr. Tomuschat, speaking at the 1955th meeting (ibid., p. 74, para. 28), noted that the comparison made with the 1969 Vienna Convention was not completely justified as the scope of the jurisdiction of the Court in the matter of State responsibility would be wider than under the Vienna Convention and would encompass disputes relating to jus cogens or international crimes in their entirety and with all legal implications. Mr. Koroma at the 1955th meeting (ibid., p. 75, para. 35) favoured referral of all cases involving an alleged breach of jus cogens or an alleged international crime to the ICJ.

32/ Mr. Arangio-Ruiz at the 1952nd meeting (ibid., p. 61, para. 28) and at the 1955th meeting (ibid., p. 73, para. 12); Mr. Calero-Rodrigues at the 1953rd meeting (ibid., p. 65, para. 33); Mr. Lacleta Munoz at the 1954th meeting (ibid., p. 68, para. 14); Mr. Tomuschat at the 1955th meeting (ibid., p. 74, para. 28); Mr. Koroma at the 1955th meeting (ibid., p. 75, para. 35); Mr. Francis at the 1955th meeting (ibid., p. 77, para. 57); and Mr. Jacovides at the 1955th meeting (ibid., p. 78, para. 66).

33/ Mr. Arangio-Ruiz at the 1952nd meeting (ibid., p. 60, para. 26).

18. One member considered that giving jurisdiction to the ICJ was obviously the ideal solution, 34/ while another favoured compulsory jurisdiction with respect to article 4 (a) only. 35/ Some members thought that "the fact that compulsory dispute-settlement machinery applicable to the interpretation and application of the draft articles in parts 1 and 2 would inevitably cover a very wide area should not deter the Commission from attempting to devise such machinery". 36/ A few members preferred not to refer to the rules of jus cogens at all but agreed that, if article 4 (a) was retained, the decision on the content of jus cogens was indeed to be made by the ICJ. 37/ Others considered that the proposal in article 4 (a) was a good one, but at variance with practice in view of the limited number of States that had accepted the optional clause under Article 36, paragraph 2 of the ICJ Statute. 38/

19. As regards the submission of disputes concerning the application or interpretation of provisions relating to jus cogens and international crimes, some members wondered why article 4, unlike the corresponding provisions of the 1969 Vienna Convention on which it was based, did not contemplate the possibility of submitting such disputes to arbitration by common consent. 39/ This question was viewed as calling for clarification for two reasons: it was noted first that, although the Vienna Convention allowed for resort to arbitration, the reference to the compulsory jurisdiction of the ICJ had apparently thus far prevented many developing countries from ratifying the

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34/ Mr. Thiam at the 1956th meeting (ibid., p. 82, para. 33).

35/ Mr. Sucharitkul at the 1954th meeting (ibid., p. 67, para. 7).

36/ Sir Ian Sinclair at the 1895th meeting (ibid., p. 118, para. 15). Along the same lines, Mr. Jacovides at the 1955th meeting (ibid., p. 78, para. 65).

37/ Mr. Ogiso at the 1954th meeting (ibid., p. 69, para. 25).

38/ Mr. Huang at the 1954th meeting (ibid., p. 70, para. 32); and Mr. Diaz-Gonzalez at the 1954th meeting (ibid., p. 70, para. 35). Similarly, but in respect of article 4 as a whole, Mr. Malek at the 1952nd meeting (ibid., p. 59, para. 17).

39/ Mr. Malek at the 1952nd meeting (ibid., p. 59, para. 12); Mr. Ogiso at the 1954th meeting (ibid., p. 69, paras. 24-25); Mr. Yankov at the 1959th meeting (ibid., p. 71, para. 40); and Mr. Razafindralambo at the 1956th meeting (ibid., p. 79, para. 4).

said Convention. 40/ It was furthermore remarked that although article 3 (1) of Part Three referred to Article 33 of the Charter (which covers judicial settlement), article 4 provided for the jurisdiction of the ICJ and made no mention of arbitration. 41/ One member, on the other hand, felt that the Special Rapporteur had rightly refrained from envisaging the possibility of arbitration in paragraphs (a) and (b) of article 4 42/ inasmuch as, from the perspective of jurisprudential development, "adjudication by the ICJ would produce a more consistent development". 43/ Mr. Riphagen explained that while, with respect to jus cogens, international crimes and the application of the Charter, the rules of Part Three were not residual, the compulsory jurisdiction of the ICJ was limited. 44/ He then said, rather confusingly, that under paragraph 1 of article 3, parties were of course free to submit the dispute to arbitration. 45/

20. In the Sixth Committee, many States 46/ supported the compulsory jurisdiction of the ICJ with respect to disputes regarding jus cogens and international crimes. For other disputes, they favoured a reference to the flexible enumeration of means of settlement contained in Article 33 of the Charter and, in addition, compulsory conciliation. Italy held that article 4 (a) and (b) should provide for the possibility of arbitration, 47/ while

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40/ Mr. Razafindralambo at the 1956th meeting (ibid., p. 79, para. 4).

41/ Ibid., para. 7.

42/ Mr. Francis at the 1955th meeting (ibid., p. 77, para. 58).

43/ Ibid. See also the statement of Mr. Riphagen at the 1956th meeting (ibid., p. 84, para. 47 and p. 85, para. 54).

44/ Mr. Riphagen at the 1956th meeting (ibid., p. 83, paras. 41, 44).

45/ Ibid., p. 84, para. 47.

46/ Including Sierra Leone (A/C.6/41/SR.27, para. 90); Madagascar (A/C.6/41/SR.30, paras. 41-42); Ireland (A/C.6/41/SR.32, paras. 8-9); Italy (A/C.6/41/SR.32, para. 21); Brazil (A/C.6/41/SR.36, para. 11); the Federal Republic of Germany (A/C.6/41/SR.36, para. 57); Denmark (A/C.6/41/SR.36, para. 66); Argentina (A/C.6/41/SR.40, para. 27); Canada (A/C.6/41/SR.40, para. 39; Sudan (A/C.6/41/SR.40, para. 41); Greece (A/C.6/41/SR. 42, para. 36); and Chile (A/C.6/41/SR.43, para. 62).

47/ A/C.6/41/SR.32, para. 21.

Cyprus would have preferred all disputes falling within article 4 to be settled through a dispute-settlement system entailing a binding decision by the ICJ or by an international criminal court. 48/

21. Another technical aspect on which ILC members raised doubts concerns the period of twelve months provided for in article 4, which some 49/ considered to be too long.

4. Provisions of the draft to which the envisaged procedures should apply

22. Another issue was to identify the provisions (substantive or instrumental) of the draft to the application or interpretation of which the envisaged procedures should apply. Some members, during the debate on the sixth report, expressed concern that the establishment of a separate system for the settlement of disputes "could be said to amount to the creation of a multilateral compulsory dispute settlement procedure relating to all (primary) obligations, present and future, under international law, of States becoming parties to the convention on State responsibility". 50/ With regard to Mr. Riphagen's proposals, on the other hand, some members were of the view that the application of Part Three of the draft as it now stood appeared to be limited to Part Two instead of covering Part One as well. 51/

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48/ A/C.6/41/SR.37, para. 11.

49/ Including Mr. Flitan at the 1952nd meeting (Yearbook ... 1986, vol. I, p. 60, para. 20); and Mr. McCaffrey at the 1953rd meeting, ibid., p. 63, para. 7). Some considered that the determination of that period depended on the type of the settlement mechanism used: among them, Mr. Ogiso at the 1954th meeting (ibid., p. 69, para. 18 and p. 69, para. 23); and Mr. Roucounas at the 1956th meeting (ibid., p. 80, para. 16). Mr. Flitan, speaking at the 1952nd meeting (ibid., p. 60, para. 20) stressed the necessity of a provision covering cases of special urgency and some members proposed to replace the words "twelve months" by "reasonable period of time", in particular Mr. Jagota and Mr. Balanda at the 1955th meeting (ibid., respectively, p. 74, para. 19 and p. 76, para. 46).

50/ In this sense, Mr. Riphagen, in his sixth report (Yearbook ... 1985, vol. II (Part One), document A/CN.4/396, p. 16, para 8) as quoted by Mr. Calero-Rodrigues at the 1892nd meeting (ibid., vol. I, p. 101, para. 45).

51/ Including Sir Ian Sinclair at the 1952nd meeting, (Yearbook ... 1986, vol. I, pp. 60-61, paras. 21, 22, 31, 32) and at the 1953rd meeting (ibid., p. 65, para. 35); Mr. Arangio-Ruiz at the 1952nd meeting (ibid., pp. 60-61, paras. 25, 33); Mr. Thiam at the 1956th meeting (ibid., p. 82, para. 31); Mr. McCaffrey at the 1953rd meeting (ibid., pp. 62-63, paras. 2, 8). Mr. Razafindralambo, speaking at the 1956th meeting (ibid., p. 79, para. 2),

5. The question of reservations

23. As regards draft article 5, some members commented on the admissibility of reservations relating to Part Three of the draft. 52/ While one member considered as acceptable the provision of draft article 5 excluding reservations except in relation to the application of draft article 4 (c) to disputes concerning countermeasures where the right allegedly infringed by such countermeasures arises solely from a treaty concluded before the entry into force of the convention, other members 53/ found that the rule of

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thought it logical to infer that the three Parts formed a coherent whole. He nevertheless indicated that he would appreciate a clearer reference in Part Three to Part One. The Special Rapporteur made it clear at the 1952nd meeting (ibid., p. 60, para. 24) that the three parts of the draft were interdependent. He further stated at the 1956th meeting (ibid., p. 82, para. 38) that "in any attempt to apply the provisions of part 2, it was impossible to get away from the application of the provisions of part 1".

52/ Sir Ian Sinclair held at the 1895th meeting (Yearbook ... 1985, vol. I, p. 118, para. 15) that the Special Rapporteur should, in working out the details, include "some kind of temporal limitation to exclude disputes relating to acts or facts which might have occurred prior to the proposed convention's entry or facts which might have occurred prior to the proposed convention's entry into force".

53/ Including Mr. Sucharitkul at the 1954th meeting (Yearbook ... 1986, vol. I, p. 67, para. 9); and Mr. Lacleta Munoz at the 1954th meeting (ibid., p. 68, para. 15). Although Mr. Reuter and Mr. Ogiso viewed article 5 as acceptable in general and Mr. Jacovides was also inclined to accept it, they all noted - as did others - that the crucial question of reservations could in accordance with tradition be dealt with in a future diplomatic conference. On this point, see Mr. Reuter at the 1953rd meeting (ibid., p. 64, para. 23); Mr. Ogiso at the 1954th meeting (ibid. p. 69, para. 28); Mr. Jacovides at the 1955th meeting (ibid., p. 78, para. 68); Mr. Lacleta Munoz at the 1954th meeting (ibid., para. 15); Mr. Yankov at the 1954th meeting (ibid., p. 71, para.44); Mr. Tomuschat at the 1955th meeting (ibid., p. 75, para. 31); and Mr. Razafindralambo at the 1956th meeting (ibid., pp. 79-80, para. 8). While Mr. Malek agreed with Mr. Yankov that the possibility of reservations to Part Three would make the convention a lot more acceptable to States, he disagreed with Mr. Yankov's inclination to accept reservations to the future convention. He observed in particular at the 1952nd meeting (ibid., p. 58, para. 9) that, in June 1985, the Vienna Convention on the Law of Treaties had only been ratified by 46 States, 10 of which had formulated reservations or objections to the dispute-settlement procedure. For Mr. Yankov, speaking at the 1954th meeting (ibid., p. 71, paras. 39-41), acceptance of reservations to the future convention was in conformity with the 1969 Vienna Convention as well as with the articles 297 and 298 of 1982 Convention on the Law of the Sea concerning limitations on and exceptions to compulsory procedures entailing binding decisions.

non-retroactivity in draft article 5 was unduly restrictive. 54/ Still others 55/ were not convinced of the usefulness of draft article 5 and felt it preferable to keep the matter entirely open.

24. In the course of the debate in the Sixth Committee, most States 56/ advocated a more flexible approach to the question of reservations. For one State, 57/ article 5 was acceptable, while for others, the question ought to be left to the future diplomatic conference. 58/

C. Conclusion

25. On the whole, the Commission seemed to be satisfied, in 1985-1986, with the general dispute settlement system resulting from the provisions of our predecessor's relevant draft articles in Part Three. We refer to the combined effect of paragraph 1 of article 3 and subparagraph (c) of article 4 as proposed in 1986; and, of course, to paragraph 2 of article 3.

26. In the opinion of the present Special Rapporteur, the Commission should carefully reconsider the whole matter. It should so do particularly in the light of the necessity to curb the negative aspects of countermeasures denounced in our third and fourth reports (A/CN.4/440 and Add.1 and A/CN.4/444 and Corr.1 and Add.1, 2 and 3) and articulately stressed in the Sixth Committee debate of last year (infra, paras. 30-35). A number of elements, including the better prospects opened for dispute settlement by recent and less recent developments and attitudes seem to indicate that a more elaborate

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54/ Among whom Mr. Tomuschat at the 1955th meeting (ibid., p. 75, para. 31). Mr. Jagota, speaking at the 1955th meeting (ibid., p. 74, para. 21), proposed to provide simply that reservations would be allowed in case of disputes arising after the entry into force of the future convention. It is not entirely clear however whether this approach would be less restrictive.

55/ Including Mr. Calero-Rodrigues at the 1953rd meeting (ibid., p. 65, para. 34) and Mr. Francis at the 1955th meeting (ibid., p. 77, para. 59).

56/ Among which China (A/C.6/41/SR.39, para. 28). Austria held that States could not be prevented from making reservations with respect to article 4 (a) and (b) (A/C.6/41/SR.39, para. 24).

57/ Cyprus (A/C.6/41/SR.37, para. 10).

58/ Ethiopia (A/C.6/41/SR.38, para. 23).

solution is both necessary and possible. Serious consideration should also be given, in our view, to the desirability for a body like the Commission to seize the opportunity to make a significant contribution, in the light of the letter and spirit of General Assembly resolution 44/23 of 17 November 1989 on the United Nations Decade of International Law to the progressive development of a vital area of international law that appears to have been very inadequately taken care of, so far, in the framework of the codification process.

## SECTION 2

## DISPUTE SETTLEMENT IN PART THREE OF THE DRAFT

### A. The problematic features of unilateral reactions

27. The inclusion in Part Three of the draft of elaborate dispute settlement procedures is highly advisable given the nature of the measures that Part Two of the draft articles is to envisage as remedies (facultés) open to an injured State. As noted in our previous reports (see e.g. A/CN.4/440, paras. 2 to 6), countermeasures are the most difficult and controversial aspect of the whole regime of State responsibility. In addition to the fact that every State considers itself entitled to be in principle the judge of its rights, subject only to the possibility of agreed negotiated or third party settlement, the necessity of ensuring compliance with legal obligations within an inorganically structured inter-State system entails as a consequence the further potentially arbitrary element represented by the injured State's faculté to resort to unilateral measures which are tantamount to actual, if lawful, non-compliance with one or more of its own obligations towards the alleged wrongdoer. It is in view of this very serious drawback, further aggravated by the unequal ability of States to adjust to such a rudimentary system, that any recognition in the draft of the said faculté - such as may be warranted by a long standing custom - must be accompanied by as many stringent conditions and limitations as are compatible with the effectiveness of the reaction to an internationally wrongful act.

28. It is obvious, on the other hand, that whatever conditions and restrictions are imposed on the practice of countermeasures, such measures will always, by their very nature, suffer from a basic flaw, namely the unilateral assessment of, on the one hand, the injured right and its infringement and, on the other hand, the legality of the reaction, a reaction which in turn can provoke a further unilateral reaction (the so-called counter-reprisals) from the alleged wrongdoer. Potentially flawed in all circumstances, even where the States involved are of comparable power or means, the remedy of countermeasures may lead to intolerably unjust results when applied between States of unequal strength or means. It is essentially because of those negative aspects that doubts arise as to the desirability of providing for a legal regime of countermeasures within the framework of a codification project. While there may be sufficient evidence that the

practice of countermeasures is admitted, whatever its limits, under customary international law, no responsible "legislator" can avoid the temptation to either expressly rule out the practice of countermeasures as illegal (as a matter of progressive development) or at least keep silent on that practice so as not to legitimize it explicitly.

29. Considerations such as those were obviously at the root of the strong reservations which the inclusion in the draft of a legal regime of countermeasures has given rise to, first at the Commission's last session and later - more pointedly - in the Sixth Committee of the General Assembly. As remarked by one of the delegates to the Sixth Committee, "several members of the Commission ... were not convinced that countermeasures were an appropriate means of coercing a State alleged to have committed an internationally wrongful act to go to dispute settlement or to acknowledge its wrong and make amends". Even stronger doubts were voiced in the course of the debate in the Sixth Committee at the last session of the General Assembly; and the reservations expressed in both bodies in 1992 were significantly more forceful (especially in the Sixth Committee) than had been those formulated in the ILC debates of 1984, 1985 and 1986 58 bis/ and in the corresponding debate in the Sixth Committee 58 ter/ on our predecessor's proposed draft articles on

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58 bis/ Yearbook ... 1984, vol. I, 1858th, 1860th, 1861st, 1865th, 1866th and 1867th meetings and vol. II (Part Two), paras. 349-380; Yearbook ... 1985, vol. I, 1890th to 1902nd meetings and vol. II (Part Two), paras. 108-163; Yearbook ... 1986, vol.I, 1952nd to 1956th meetings and vol. II (Part Two), paras. 40-65).

58 ter/ Official Records of the General Assembly, Thirty ninth Session, Sixth Committee, 33rd to 47th meetings; ibid., Fortieth Session, Sixth Committee, 23rd to 35th meetings; and ibid., Forty first Session, Sixth Committee, 27th to 34th and 36th to 44th meetings.

countermeasures. Some of the statements made in the course of the Sixth Committee debates are worth recalling. 59/

### B. The 1992 debates on countermeasures in the Commission and in the Sixth Committee

30. Some States observed in the first place that in the absence of a mechanism for the impartial and rapid determination of the existence of an internationally wrongful act, the injured State had to be granted an exclusive right to determine the existence of a wrongful act - which opened the door to unilateral acts, many of which would be based on subjective decisions, and to abuses with serious consequences for the peace and happiness of peoples. The remark was also made that leaving it to the victim State to assess the gravity of the prejudice and to determine if all available settlement procedures had been exhausted meant that neither the impartiality nor the lawfulness of the

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59/ It is also worth noting that the latter reservations had themselves been more articulate than those made in the late seventies when countermeasures were included (in article 30 of Part One) among the circumstances excluding wrongfulness.

For example, concerns and doubts were expressed with regard to countermeasures in the course on the debate on Mr. Ago's eighth report (Yearbook ...1979, vol. II, Part One). These related mainly to the prohibition of armed reprisals (ibid., vol. I, p. 58, paras. 33-34); the necessity of distinguishing unilateral reactions from sanctions applied by international institutions (ibid., p. 59, para. 5); and the necessity to avoid abuse by strong States to the detriment of the weak (ibid., p. 60, paras. 11 and 12). As confirmed by the "Topical Summary" (A/CN.4/L.311), very few doubts were expressed, in the course of the 1979 debate of the Sixth Committee on article 30, with regard to the legitimacy of unilateral reactions accompanied by precise limitations and conditions. This was surely due, in part, to the fact that the régime of countermeasures was only to be dealt with at a later stage within the framework of Part Three of the draft. The debate became obviously richer in 1984-1986, following the submission of Professor Riphagen's draft articles 8, 9 and 10 of Part Two. Within the ILC, the question was raised whether resort to countermeasures would be lawful in the absence of a previous objective determination of the existence of an internationally wrongful act. The answer was that the draft articles, as proposed, provided that, unless a possibility existed of prior resort to dispute settlement mechanisms already in existence between the parties, there would necessarily have to be a "provisional" unilateral determination on the part of the injured State and that adequate consideration of the problem of dispute settlement would be taken up at a later stage within the framework of Part Three (Yearbook ... 1984, vol. II (Part Two), p. 103, paras. 365 and 366). Much more significant were the 1984 and 1985 debates in the Sixth Committee. To these we shall revert in paras. 37 et seq. infra.

decisions to be taken could be guaranteed. 60/ It was further noted in this connection that the notion that the injured party should take the law into its own hands represented a lower stage in the evolution of legal techniques and implied admission of the inadequacy of the international legal order. Concern was also expressed that the concept of countermeasures seemed antithetical to fundamental principles of international law. 61/

31. A number of representatives - echoing the identical preoccupation expressed in our third and fourth reports - stressed that, States being unequal in size, wealth and strength, a regime of countermeasures, far from affording equal protection to all States, would place powerful or rich countries at an advantage in the exercise of reprisals against the wrongdoing States and would lead to abuse of the weaker States. This fear, it was stated, was rooted in history as well as in the more recent experience of developing countries, for which countermeasures were frequently synonymous with aggression, intervention and gunboat diplomacy. Against this background the question was asked whether an attempt at codification of the subject might not tend to legitimize countermeasures as an instrument par excellence of the hegemonic activities of certain Powers. 62/

32. The desirability of including in the draft a legal regime of countermeasures was further questioned on the ground that, far from constituting a remedy intended to encourage the wrongdoing State to return to the path of legality, countermeasures were likely to merely inflame relations between the parties to the conflict, thereby rendering them even more

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60/ Russian Federation (A/C.6/47/SR.28, para. 106); Belarus (A/C.6/47/SR.27, paras. 80, 83); Cuba (A/C.6/47/SR.29, para. 60); and Romania (A/C.6/47/SR.29, para. 24).

61/ Brazil (A/C.6/47/SR.25, para. 39). Along the same lines, Sri Lanka (A/C.6/47/SR.27, para. 6).

62/ Along those lines, Brazil (A/C.6/47/SR.25, para. 39); Morocco (A/C.6/47/SR.25, para. 85); Sri Lanka (A/C.6/47/SR.27, para. 6); Indonesia (A/C.6/47/SR.28, para. 65); China (A/C.6.47/SR.29, para. 58); and Algeria (A/C.6/47/SR.29, para. 70). This preoccupation does not seem to be significantly reduced by the consideration put forward by Spain "that while powerful and developed States are undeniably in a better position than weak States to adopt countermeasures, it had to be borne in mind that countermeasures could also be applied between States of comparable strength" (A/C.6/47/SR.26, para. 74).

intransigent. 63/ This remark echoes in part our predecessor's preoccupation that resort to countermeasures on the part of an allegedly injured State might result in an escalation of countermeasures.

33. The view was also expressed that any legal regime of countermeasures would inevitably involve intricate qualifications and limitations, and that further complexities would arise in defining the circumstances in which countermeasures would be permissible in cases where more than one State considered itself to have been injured. In such cases, the question of who the injured States were, the extent of their entitlement to have recourse to a countermeasure and the question of the countermeasure's proportionality, viewed not only individually but also collectively, would be difficult to answer with precision. 64/ It was added in the same context that the issue of countermeasures that would not be permissible under any circumstances came perilously close to touching upon some of the fundamental provisions of the Charter of the United Nations set forth, for example, in Article 2, paragraph 4, and Articles 51, 41 and 42. 65/

34. From a very different angle, the desirability of providing for a legal regime of countermeasures seems to have been put in question by the remark that countermeasures, which in some respects constitute means of enforcement, do not fall "precisely within the scope of the question of State responsibility even if they are linked to it". Concern was expressed from the same source that, by broadening the subject, the Commission might be tempted to raise problems regarding the interpretation of specific treaties which should remain outside the scope of its study and find itself addressing particularly sensitive issues going beyond the limits which it had set to itself, by dealing with primary rules - in particular the definition of the areas in which countermeasures should be prohibited. 66/

35. It is worth stressing in particular that a few representatives said that they found it difficult to endorse the notion that the way to deal with the

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63/ Switzerland (A/C.6/47/SR.25, para. 93); and Islamic Republic of Iran (A/C.6/47/SR.25, para. 61).

64/ Sri Lanka (A/C.6/47/SR.27, para. 4).

65/ Sri Lanka (ibid.).

66/ France (A/C.6.47/SR.26, para. 5).

consequences arising from a wrongful act was to commit another wrongful act, particularly as cases of non-observance by States of their international obligations were, for the most part, not deliberate, but due to genuine oversights, misunderstandings or differences of opinion. Furthermore, it was observed, countermeasures were not the only means of enforcing international law where an obligation under international public law had been breached and the margin for lawful resort thereto had been narrowed by the emergence of more suitable methods and procedures tailored to the special needs of certain groups of States. 67/ The nature of the "tailored procedures" or the small groups of States involved in any really effective settlement arrangements were however not elaborated upon.

36. Despite the reported perplexities, most representatives in the Sixth Committee seem to have concurred, last autumn, with the majority of the Commission that countermeasures had a place in any legal regime of State

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67/ Uruguay (A/C.6.47/SR.27, para. 20); and Sri Lanka (A/C.6.47/SR.27, para. 3). Among those methods and procedures, some representatives singled out those relating to the peaceful settlement of disputes. One representative observed in this connection that it might be possible to expand existing dispute- settlement procedures to include additional and innovative ones so as to ensure that a State believed to be in breach of an international obligation did not evade settlement of the differences which had arisen (Switzerland (A/C.6/47/SR.25, para. 92); and Russian Federation (A/C.6/47/SR.28, para. 106)). In this connection, reference was made to existing conventions in the environmental and other fields which included provisions on the monitoring of the fulfilment of treaty obligations by States parties. The concept of interim measures of protection might also be developed to ensure that a State was in a position to preserve its interests against the consequences of a wrongful act by another State until such time as the differences that had arisen were resolved (Sri Lanka (A/C.6/47/SR.27, para. 7)). Attention was also drawn to the possibilities for effective bilateral or multilateral diplomatic protestations, as well as for measures of retortion not amounting to a breach of an international obligation, which, it was stated, were not inconsiderable and, if resorted to, were likely to prove effective (Sri Lanka (A/C.6/47/SR.27, para. 7; and France (A/C.6/47/SR.26, para. 7)). Emphasis was furthermore placed on the opportunities offered by collective mechanisms for the prevention and redress of internationally wrongful acts. One representative said in this connection that at a time when processes of disintegration were impeding the harmonious development of the international community, it was important to refrain from granting a legally superior standing to reprisals which were unilaterally decided upon and to establish instead a common legal standard which would serve as a framework for the collective action undertaken by the community of nations on the basis of the United Nations Charter and other universally recognized instruments with a view to preventing and eliminating the consequences of internationally wrongful acts (Russian Federation (A/C.6/47/SR.28, para. 107)).

responsibility. 68/ Unilateral measures were recognised to be a reflection of the imperfect structure of the international society, which had not yet succeeded in establishing an effective centralized system of law enforcement,69/ with the result that countermeasures would continue to be needed for a long time to confront internationally wrongful acts. 70/ Hence the necessity, stressed by almost all speakers in the Sixth Committee, of carefully studying the conditions and limitations to be placed on the scope of unilateral enforcement action. 71/

C. The 1984-1985 debates on the subject

37. Although less articulate than those of 1992, the comments put forward in the Sixth Committee in 1984-1985 should not be overlooked. According to the 1984 "Topical Summary" (A/CN.4/L.382),

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68/ See the statements of Brazil (A/C.6/47/SR.25, para. 39); Islamic Republic of Iran (A/C.6/47/SR.25, para. 62); Spain (A/C.6/47/SR.26, para. 74); and Belarus (A/C.6/47/SR.27, para. 81).

69/ See the statements of Belarus (A/C.6/47/SR.27, para. 80); Egypt (A/C.6/47/SR.30, para. 30); Poland (A/C.6/47/SR.28, para. 78); Ecuador (A/C.6/47/SR.30, para. 49); Denmark on behalf of the Nordic States (A/C.6/47/SR.25, para. 32); Czechoslovakia (A/C.6/47/SR.25, para. 44); Islamic Republic of Iran (A/C.6/47/SR.25, para. 62); Azerbaijan (A/C.6/47/SR.27, para. 33); and Italy (A/C.6/47/SR.29, para. 47).

70/ See the statements of China (A/C.6/47/SR.25, para. 24); Ecuador (A/C.6/47/SR.30, para. 49); Thailand (A/C.6/47/SR.27. para. 26); Austria (A/C.6/47/SR.26, para. 47); Japan (A/C.6/47/SR.26, para. 31); Hungary ((A/C.6/47/SR.28, para. 150); Jordan (A/C.6/47/SR.28, para. 41); Spain (A/C.6/47/SR.26, para. 75); Italy (A/C.6/47/SR.27 para. 47); and Islamic Republic of Iran (A/C.6/47/SR.25, para. 62).

71/ With a few differences in emphasis, this view was universally shared, except by those who believed (as noted in paragraph 34 supra) that the regime of countermeasures was not to be considered as part of the topic of State responsibility. See for instance the statements of Denmark on behalf of the Nordic States (A/C.6/47/SR.25, para. 32); Brazil (A/C.6/47/SR.25, para. 35); Austria (A/C.6/47/SR.26, para. 47); Bahrain (A/C.6/47/SR.26, para. 19); Japan (A/C.6/47/SR.26, paras. 31 and 32); Italy (A/C.6/47/SR.29, para. 47); Jordan (A/C.6/47/SR.28, para. 41); Spain (A/C.6/47/SR.26, para. 75); Switzerland (A/C.6/47/SR.25, para. 93); United States (A/C.6/47/SR.27, para. 37); Pakistan (A/C.6/47/SR.29, para. 62); Egypt (A/C.6/47/SR.30, para. 30); Venezuela (A/C.6/47/SR.27, para. 89); Tunisia (A/C.6/47/SR.30, para. 45); Thailand (A/C.6/47/SR.27, paras. 27, 28); Belarus (A/C.6/47/SR.27, para. 80); Cyprus (A/C.6/47/SR.21, paras. 81, 89, 90); India (A/C.6?47/SR.25, paras 72, 73, 76); Algeria (A/C.6/47/SR.29, paras 70, 71); China (A/C.6/47/SR.27, para. 24); and Slovenia (A/C.6/47/SR.26, para. 37).

"Some representatives expressed the view that the subject of reprisals should be approached with great caution and maximum safeguards because of abuses that had occurred. The view was expressed that reprisals should not be dealt with in the articles. Application of the provisions of draft article 9 could create serious uncertainty in international relations. There was a need, it was said, to consider its replacement by peaceful means of settlement. The view was expressed that third-party compulsory settlement of disputes was essential for the application of the provisions of draft article 9. The provisions of draft article 9 might, otherwise, lead to intolerable situations involving uses of reprisal which had, hitherto, been inadmissible." (Ibid., para. 520, emphasis added).

The "Topical Summary" also contains the following paragraphs:

"It seemed to one representative that some clarification was required in draft article 10 which seemed to imply that reprisals should be viewed as an extreme measure of coercion applicable only after all international procedures for peaceful settlement of disputes available to the injured State had been exhausted It seemed necessary to clarify whether draft article 10 would be applicable to situations whose urgency made use of peaceful settlement procedures impracticable; and as to how draft article 10 would be applicable when a State alleged to have committed an internationally wrongful act did not consider the act wrongful and denied the existence of a dispute".

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"The question was raised by one representative as to why paragraph 2 (b) of draft article 10 referred, exceptionally, to a 'State alleged to have committed the internationally wrongful act'. He wondered whether the divergence in terminology was intentional, and noted that compulsory third-party settlement of disputes seemed essential to implementation of the draft articles". (Ibid., paras. 526 and 529, emphasis added).

38. A very careful treatment of the whole matter - countermeasures and dispute settlement - was again urged by representatives in the Sixth Committee in 1985 (A/CN.4/L.398). The views expressed may be summarized as follows: (a) the legitimization of countermeasures might lead to abuse and injustice; (b) a rigid, strict regime should be envisaged for unilateral countermeasures (with only a few speakers contending that such measures should be ruled out

altogether); (c) dispute settlement procedures would significantly contribute to reducing the risk of abuse and injustice (with a few speakers going so far as to suggest that such procedures should be an alternative to unilateral reactions). At the same time concern was expressed that an obligation of prior exhaustion of dispute settlement procedures might unjustly paralyse the allegedly injured State to the advantage of the allegedly law-breaking State. On the whole, the 1984 and 1985 debates of the Sixth Committee clearly reveal doubts with regard to the legitimization of countermeasures. Those doubts are, however, far less pronounced and systematic and less widely shared.

D. Conclusion

39. Reverting to the 1992 debates, one should take account of the differences which manifested themselves on the question whether the legal regime of countermeasures should be viewed as a matter of mere codification or of progressive development. 72/ Those differences had less to do with substance than with the angle from which the matter was approached. From the viewpoint of the general principle of the past and present admissibility of unilateral reactions, there seemed to be no doubt that countermeasures were firmly grounded in customary international law. From the viewpoint of the regulation of unilateral reactions, the area was rightly viewed as requiring also progressive development. In the words of one representative, "[I]t was not possible to rest content with a ... systematization of the existing rules ... for fear of perpetuating a discredited order. On the contrary, [one] must depart from ... precedents and embark more resolutely on the road to renewal, while working for the progressive development of international law with a view to limiting recourse to countermeasures". 73/

40. The Sixth Committee thus seems to have recognized that:

- at least in the long run, countermeasures should be replaced by means more consonant with an adequate rule of law;
- resort to countermeasures should be limited;
- and, most importantly, the safeguards against abuse of unilateral reactions should be strengthened.

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72/ Denmark on behalf of the Nordic States (A/C.6/47/SR.25, para. 32).

73/ Islamic Republic of Iran (A/C.6/47/SR.25, para. 63) (emphasis added). Along the same lines, Czechoslovakia (A/C.6/47/SR.25, para. 45); Thailand (A/C.6/47/SR.27, para. 29); Sri Lanka (A/C.6/47/SR.27, para. 1); Chile (A/C.6/47/SR.24, para. 42); and China (A/C.6/47/SR.25, para. 23).

## SECTION 3

## DISPUTE SETTLEMENT PROVISIONS AS AN ELEMENT OF THE DRAFT ON STATE RESPONSIBILITY

### A. An adequate dispute settlement system as an indispensable complement to a regime governing unilateral reactions

41. In the view of the Special Rapporteur, the negative aspects of countermeasures almost unanimously denounced by members of the Commission and representatives in the Sixth Committee are not only very real but extremely serious. They are serious enough to justify, to some extent, the attitude of those - government officials or scholars - who suggest that countermeasures should not find room in a codification exercise even for the purpose of subjecting them to conditions and limitations. 74/ It must be realized,

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74/ This understandable attitude has a precedent in the history of the ILC itself. When the Commission discussed, in the sixties, the draft articles on the law of treaties, the question arose whether the rule inadimplenti non est adimplendum should extend or not to the violation, by way of reaction to the breach of a given treaty, to treaties other than the infringed treaty itself (the matter is dealt with by, inter alios, M.L. Forlati, La sanzione nel diritto internazionale, Padua, 1974, pp. 81-85 et seq.). The issue was, on that occasion, whether the measures of suspension to be envisaged in what was to become article 60 of the Vienna Convention should be extended by the Convention (beyond the strict rule inadimplenti non est adimplendum) to the rules of other treaties or to rules of customary international law. The view that rightly or wrongly prevailed in the Commission was that the draft on the law of treaties should not envisage any suspension (by way of unilateral reaction) either of other treaties or of customary law. This conclusion, however, was not based on any denial of the faculté of a State to react to a treaty violation by non complying with an obligation deriving from a different treaty or from a rule of customary law - a faculté of which no one seemed to contest the existence under general international law. If the view prevailed that the draft on the law of treaties should confine itself to the hypothesis of a reaction consisting in a violation of the same treaty (if not of the same rule), it was because of the reluctance of the Commission to touch upon the faculté of reprisals on countermeasures - a right of which the Commission preferred not to address in the article concerned.

As indicated by the Special Rapporteur, Sir Humphrey Waldock, in paragraph 14 of his commentary to what was then article 20 (Termination or suspension of a treaty following upon its breach),

> "Paragraph 3 sets out the rights of the innocent party in case of a material breach of a bilateral treaty. These are to abrogate the whole treaty or suspend its whole operation or, alternatively, to terminate or suspend the operation only of the provision which has been broken by the defaulting party. The latter right, like the former, is an application of the principle inadimplenti non est adimplendum, endorsed by Judge Anzilotti in the Diversion of Water from the River Meuse case.

however, that there is not a single flaw, among those denounced, which could not be corrected by providing for an adequate dispute settlement system.

42. It is indeed perfectly true (para 29 supra) that countermeasures are not an "appropriate means of coercing a State ... to go to dispute settlement or to acknowledge its wrong and make amends." They are however, a means, and the only way to correct their drawbacks is precisely to persuade governments to accept to go to dispute settlement, more specifically to submit to some form or forms of third party settlement, either as a substitute for countermeasures or, at least, as a method to evaluate the admissibility and the lawfulness of any unilateral measures resorted to.

43. Similar considerations apply to the other negative aspects of countermeasures (paras. 30-35 supra). The inclusion in the draft of an adequate and reasonably effective dispute settlement system would be of decisive help in minimizing or eliminating :

(a) first of all, the major drawback represented by the fact that a regime of unilateral reaction by the injured State would place "powerful and rich countries at an advantage" to the detriment of weaker States (para. 31 supra);

(b) secondly, the danger that countermeasures inflame relations between the parties, thereby rendering them more intransigent (para. 32 supra).

A more effective availability of third party settlement procedures could not but reduce, to the extent that it proved feasible, the unbalance deriving from the factual inequalities among States and provide the parties with an opportunity to "cool off".

44. There is no doubt that adequate dispute settlement procedures would also contribute decisively to making the practice of countermeasures - which admittedly reflect "a lower stage in the evolution of legal techniques" and "imply admission of the inadequacy of the international legal order"

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Admittedly, it may also be put upon the basis of a right to take non-forcible reprisals and upon that basis it is arguable that the innocent party may suspend the operation not necessarily of the provision which has been broken but of some other provision of special concern to the defaulting party. The terms of paragraph 2 are not intended to exclude whatever other rights may accrue to the innocent party by way or reprisal; but it is thought better not to introduce the law of reprisals, as such, into the present article."
(Yearbook ... 1963, vol. II, document A/CN.4/156 and Add.1-3, p. 76)

(para. 30 supra) - more compatible or less incompatible with the rule of law in inter-State relations. Resort by one party to countermeasures would, if objected to, open the way to a third party settlement procedure - which would have a deterrent effect on both reaction- and counter-reaction-prone States. This would, if not guarantee, at least strengthen the primacy of the rule of law.

45. It also goes without saying that more effective availability of third party settlement procedures would render largely moot the question whether countermeasures would in practice be sufficiently understood and clear a procedure - considering that they are subject to intricate qualifications and limitations - to be endorsed as an accepted coercive legal procedure" (para. 33 supra). Issues that States proved unable to elucidate by themselves - unilaterally or bilaterally - would be settled by conciliators and arbitrators.

46. The need to strengthen existing dispute settlement procedures in connection with the regime of countermeasures has been stressed by many speakers in the course of the 1992 debate of the Sixth Committee on the Commission's report. 75/ Only a small minority expressed the view that the project should not deal with dispute settlement. 76/

47. That a higher degree of availability of adequate settlement procedures would be an essential means of minimizing the negative aspects of unilateral measures has been confirmed by last year's debates - in the ILC and in the Sixth Committee - on draft article 12 (1) (a) as proposed by us in the fourth report. Most members and representatives expressed themselves in favour of that provision. Particularly noteworthy were the positive reactions of Switzerland, Chile, Venezuela, the Islamic Republic of Iran and Poland. The representatives who took the opposite view were concerned either by the requirement of the exhaustion of all settlement procedures - some of which, like negotiation, could be protracted over years during which it would be

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75/ See especially the statements of the Russian Federation (A/C.6/47/SR.28, para. 106); Switzerland (A/C.6/47/SR.25, para. 92); Sri Lanka (A/C.6/47/SR.27, para. 7); Belarus (A/C.6/47/SR.27, para. 80); Japan (A/C.6/47/SR.26, para. 31); Egypt (A/C.6/47/SR.30, para. 31); Jordan (A/C.6/47/SR.28, para. 42); Slovenia (A/C.6/47/SR.26, para. 38; and Denmark on behalf of the Nordic countries (A/C.6.47/SR.25, para. 3).

76/ United States (A/C.6/47/SR.27, para. 37); and Italy (A/C.6/47/SR.29, para. 46).

unfair to oblige the injured State to refrain from taking countermeasures - or by the multiplicity of existing procedures - as listed, for example, in Article 33 of the Charter which would result, in the absence of indications on an order of priority, in the process going on for years.

48. It should be noted, however, that the latter dangers would precisely be the corollary of inadequate dispute settlement obligations. Surely draft article 12 (1) (a) would be very likely to have objectionable effects on account of the abuses to which the principle of "freedom of choice" opens the door under Article 33 of the Charter. But it is precisely in order to avoid this pitfall that effective third party settlement procedures should be envisaged in Part Three of the draft. The acceptance of such procedures - with the possibility of unilateral resort to a third party by the allegedly law-breaking State following the adoption of countermeasures by the allegedly injured State - would leave no room for taking advantage of the loose "free choice" principle and would make it difficult for a recalcitrant law-breaking State to escape its obligations by resorting to protracted inconclusive negotiations or other time-consuming procedures. This solution, referred to in Section 4 infra (especially paras. 62 and ff.), would also meet the concern expressed in the Sixth Committee by a number of representatives (including those of Austria, Jordan, Morocco and Belarus) that the exhaustion of settlement procedures should be a "parallel" obligation rather than a condition to be met before resorting to countermeasures. As will be shown in Section 4, this is precisely one of the features of the proposed solution. Once this solution were accepted in Part Three, draft article 12 (1) (a) of Part Two would have to be modified accordingly.

49. It follows, in our view, that one of the most essential elements of the regulation of countermeasures is precisely - as pointed out during last year's debate 77/ - the inclusion, in Part Three, of a set of effective dispute settlement provisions. The rules on the conditions and limitations to which resort to countermeasures is subjected are clearly intended to confirm the lawfulness of unilateral reaction, while containing that faculté within acceptable as well as indispensable bounds. One of the limitations is precisely, under draft article 12 (1) (a) as proposed last year, the condition of the prior exhaustion of dispute settlement procedures "available" to the

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77/ See our statements at the 2267th and 2283rd meetings of the Commission (A/CN.4/SR.2267, p. 21 and A/CN.4/SR.2283, pp. 5 and 6).

parties under instruments other than the draft itself. The function of Part Three should precisely be to ensure that adequate dispute settlement procedures are fully "available" - at a stage to be more precisely determined further on (Section 4, paras. 60 et seq., especially 61 and 73-75) - even where such procedures are unavailable, or not fully available, on the strength of any dispute settlement arrangement in force between the parties. A sufficient degree of availability of dispute settlement procedures would adequately balance the inclusion in the draft of a legal regime of unilateral measures. It would supplement the mere regulation of resort to such measures by either providing an alternative - and a more reliable and effective alternative - to the use of countermeasures or acting as a deterrent against the abuse of countermeasures.

### B. Further reasons for including in the draft an effective dispute settlement system

50. Effective dispute settlement provisions would, in our opinion, be helpful in many respects.

51. They would first reduce, in the interest of justice, the risk of resort to unjustified or otherwise unlawful countermeasures on the part of allegedly injured States. Such a result would of course disappoint that minority of representatives who understandably (but perhaps too "conservatively") object to the idea of codifying the law of countermeasures not because they question the legitimacy of unilateral measures but because they are reluctant to see the faculté of States to resort to reprisals subjected to limits and conditions. The inclusion of dispute settlement provisions, far from going in the direction of that minority, would meet, on the contrary, and by the fairest means, the concerns of the great majority of Commission members and representatives in the Sixth Committee. We refer to those who questioned, as recalled, if not the legitimacy of countermeasures under existing international law, at least the desirability of devising - by way of codification and progressive development of the law - a legal regime of countermeasures which, however strict, could be seen as perpetuating methods not compatible with justice and the sovereign equality of States. We also, and principally, refer to all those who denounced the negative aspects of a regime of unilateral measures and called for their minimization by means more compatible with the rule of law in the inter-State system. As we noted last year, in reply to the latter objections, strict regulation of countermeasures is in any case indispensable for the implementation of international law but

the inclusion in the draft of an effective system of dispute settlement would provide an equally indispensable way of correcting the inevitable shortcomings of an implementation system which is bound to rely, for some time to come, upon unilateral reactions to the breach of international obligations.

52. Secondly, an effective dispute settlement system could not fail to bring about, together with a reduction of frictions and conflicts between allegedly injured and allegedly law-breaking States, more balanced and equitable adjustments between the parties involved. The solutions reached through conciliation, fact-finding, arbitration or judicial settlement would in all likelihood be on the whole more just, or less unjust, than those reached by mere resort to unilateral coercive measures.

53. Thirdly, one should not overlook the improvements that an effective system of dispute settlement would bring about for both potential victims and potential wrongdoers. 78/

54. As a potential victim of breaches of the law, any law-abiding State has an interest in finding in the draft on international responsibility, side by side with and as a complement to the rules on its faculté of resorting to countermeasures, dispute settlement provisions that would at least reduce the necessity for it to rely exclusively - as an ultima ratio - upon its own capability of resorting to effective unilateral reaction - a course of action which, even if available, may well prove to be costly and of uncertain efficacy.79/

55. As a potential wrongdoer, any State should in turn welcome the presence in the draft of dispute settlement provisions that would allow it better to defend itself before an effective third party forum - by challenging the admissibility or the legality of a countermeasure directed against it - rather than being forced to accept the unilateral determination and action of one or more allegedly injured States and being reduced to its own, possibly limited, capacity to react.

56. Both as a potential victim and as a potential wrongdoer, any law-abiding State should also consider that since armed reprisals have been rightly

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78/ It is not so unrealistic to hope that the adoption of effective third party settlement procedures could lead to a gradual substitution of conciliation or arbitration to unilateral reprisals - which remain the rule whenever issues of State responsibility are not settled by an early agreement.

79/ Infra, para. 56.

outlawed, the measures still permissible are mainly of an economic nature. Considering the current high degree of economic interdependence of States, and of peoples, the adoption of any economic countermeasure is likely to have adverse repercussions not just on the law-breaking State's economy - and its people - but also on the economy of the injured State itself, and, again, its people. As a result, an injured State will often find it hard to respond adequately to the infringement of one of its rights by resorting to an economic measure - to which there may be no alternative. Situations of the kind might become extremely serious for an injured State in a difficult economic situation. The possibility that economic dependence - which is not necessarily limited to unequal parties - become a "deterrent" to the adoption of measures against international delinquencies has in fact been noted in the literature. 80/ An effective settlement system seems to be the only reasonable remedy in the interest not just of States but also - and foremost - of their peoples. 81/

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80/ See for example, R. Hofmann, "Zur Unterscheidung Verbrechen und Delikt im Bereich der Staatenverantwortlichkeit", in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1985, vol. 45, p. 229: "Sicherlich birgt das danach jedem einzelnen Staat zustehende Recht auf einseitiges Ergreifen gewaltloser Repressalien die Gefahr des Missbrauches; schon die strengen Anforderungen, die nach allgemeinem Völkerrecht an die Zulässigkeit und die Art von Repressalien gestellt werden, verringern diese Gefahr aber bereits erheblich. Darüber hinaus dürfte das Risiko leichtfertiger Repressalien auch dadurch gemindert sein, dass sie zumeist im Abbruch oder der Einschränkung der Wirtschaftsbeziehungen bestehen würden und dies auch dem sie verhängenden Staat selbst Nachteile brächte." [There is no question that the danger of abuse is implicit in the right unilaterally to take non-violent reprisals which, according to this, attaches to every State; however, that danger is already much reduced by the strict requirements imposed by general international law with respect to the admissibility and type of reprisals. Moreover, the risk of rash reprisals is also likely to be diminished by the fact that reprisals will mainly take the form of the breaking off or restriction of trade relations and as such will also entail loss for the State that takes them.]

81/ It is worth recalling in this respect that, in the course of the 1978 Montreux CSCE Meeting on Dispute Settlement, one of the main arguments opposed by certain delegations to proposals on third party settlement procedures (as distinguished from the most rudimentary forms of consultation) between CSCE participating States, was that only their "people's" governments were qualified properly to determine and protect - in case of an international dispute - the interests of their respective peoples. "Neutral" or third party arbitrators or conciliators, even if chosen by the litigating governments, could not be trusted. CSCE governments seem to be better advised at the present time.

57. The above considerations should be viewed as all the more cogent as the procedures to be adopted - i.e. conciliation, fact-finding and arbitration with judicial settlement as a last resort for special problems (paras. 67 to 69 infra) - would be of such a nature that both parties to the dispute would participate in the designation of the members of the "third party" body. It follows that the third party would be unquestionably less partial than the other State which is a party to the dispute.

58. It is likely that an effective dispute settlement system would also have the following beneficial effects:

(a) it would, in a situation of plurality of injured States:

(i) reduce the difficulties inherent in that plurality - and in the possible diversity and irreconcilability of the coexisting substantive claims of the various injured States;

(ii) make it less difficult to muster and possibly coordinate a collective response (by way of countermeasures or otherwise) on the part of various States equally or unequally affected by the breach, notably in case of violation of international obligations in the area of human rights and environmental protection;

(b) it would, in a situation of plurality of law-breaking States, reduce the difficulties inherent in the determination of each State's liability;

(c) it would finally, in the case of breaches consisting in the violation of a multilateral treaty, make it less difficult to harmonize the interests, attitudes and behaviours of the various States participating in the treaty.

We propose to develop points (a), (b) and (c) at a later stage.

59. Not less importantly, an effective dispute settlement system would be likely to reduce in the future, for the most serious breaches - whether labelled "crimes" or just grave "delicts" - the necessity of relying exclusively, for the implementation of the law-breaking State's liability, on options which do not seem to us to be quite in conformity with the exigencies of progressive development of the law in this delicate area. One option seems to be reliance on the action of a few, generally Western, States able and willing to react to the breach of the supposedly erga omnes rule: a reaction which is not less unilateral and "uncontrolled" for the fact that it is "concerted" and may be justified. The other option is represented by

political bodies. The action of these bodies has so far proved to be not only indispensable but essentially beneficial and in any case more "controlled" thanks to the existence of a universal or regional constituent instrument. However, when political bodies are not paralysed for lack of the required majority, they are likely to be influenced more than is desirable by power politics; and having to respond to any situations, they may be led to stretch their action beyond the scope of the mandate entrusted to them. The strengthening of third party settlement procedures in the area of State responsibility would relieve political organs of that part of the burden which is more suitable for judicial treatment. This matter, however, will be dealt with further on, in the framework of the discussion of the consequences of international "crimes" of States as contemplated in article 19 of Part One.

## SECTION 4

## RECOMMENDED SOLUTION

### A. Introduction

60. The compelling reasons set forth in the preceding sections lead us to believe that the Commission should take a step forward from the solutions it has envisaged so far. In order to adequately reduce the negative aspects of unilateral countermeasures, as discussed in the preceding section, it would be utterly insufficient, in our view, to merely provide that in the event that resort to a countermeasure gives rise to an objection, the matter would be referred to a conciliation commission. Although a pronouncement of such a body could surely be of some help in bringing about an agreed settlement of the dispute between an allegedly injured and an allegedly wrongdoing State, the non-binding character of the outcome of conciliation makes this procedure inadequate for the purpose of correcting the negative aspects of unilateral countermeasures. The solution embodied by our predecessor in the draft article 4 (c) he submitted in 1986, leaving aside for the time being subparagraphs (a) and (b) of the same article, would be decidedly improved by the addition of more advanced third-party procedures.

61. A preliminary point to be considered, however, is the different ways in which settlement procedures (and related contracting parties' obligations) should come into play for the purposes of implementation of a State responsibility convention. We refer mainly to the way in which settlement obligations are presently contemplated in article 12 (1) (a) as proposed last year, on the one hand, and the way those obligations should be envisaged within Part Three and possibly article 12 (1) (a) itself, on the other hand. We refer particularly to the different impact that settlement obligations could have upon the injured State's faculté to resort to countermeasures.

61a. In requiring the injured State not to resort to countermeasures prior to the exhaustion of "available" settlement procedures, article 12 (1) (a) only refers to such settlement procedures as the parties may resort to in compliance with international rules other than those directly provided for in a State responsibility convention. Indeed, article 12 (1) (a) does not impose upon the injured State, as a condition for resort to countermeasures, any given settlement procedure. It merely requires that such procedures be exhausted as are "available" to the injured State on the strength of legal obligations existing prior to the dispute or agreed to thereafter. Everything

depends, therefore, on what the situation is or may become between an alleged injured State and an alleged law-breaking State with regard to dispute settlement means.

61b. It is evident that the settlement procedures in question range from the most rudimentary forms of negotiation/consultation (possibly assisted by good offices or mediation) to conciliation, arbitration, judicial settlement, regional arrangements, and procedures under Chapter VI of the Charter. Clearly the multiplicity of means listed in Article 33 of the Charter, combined with the "freedom of choice" rule, would make it very difficult to determine which settlement means - particularly effective settlement means - are available in concreto to any injured State vis-à-vis any law-breaking State at a given time and with regard to the infringement of specific primary or secondary obligations. To get a clearer picture, one should, of course, move away from multilateral systems or treaties into the more specific bilateral instruments - dispute settlement treaties and compromissory clauses - in force between given States . Even there, however, one finds a great variety of degrees of "availability". The treaties or treaty clauses establishing settlement obligations differ very considerably (ratione personarum, materiae and temporis) according to whether they contemplate procedures that can be set in motion by unilateral initiative (the maximum possibility in terms of "availability") or procedures the implementation of which would require instead in each concrete case a special agreement (compromis) to be concluded after the dispute has arisen. To assess "availability" in the latter case is far from simple, even with regard to a given pair of injured/law breaking States. Much would also depend upon the degree of inclination of each State to resort, once a concrete issue has arisen, to conciliation, arbitration or judicial settlement if automatic unilateral initiative has not been provided for in advance. Considering the variables involved (ratione personarum, materiae or temporis), only a highly gifted mathematician - if not a magician - would be willing to try to determine with any approximation the degree of "availability" of settlement procedures between any conceivable pair of States at a given time.

61c. In other words, in laying down the indispensable "exhaustion" requirement, article 12 (1) (a) only refers to settlement means rather than directly prescribing such means. This precludes the possibility of the article determining how the "exhaustion requirement" should be met by a State,

as a potential injured State, in its relation with other States, as potential wrongdoing States. Only in each particular concrete case, can one determine whether any more or less effective settlement procedures are or were "available" for the injured State to be barred by a provision such as article 12 (1) (a)) from resort to a countermeasure. Even the kind of countermeasure in question may have an important bearing on the issue. Thus, only in each particular case, taking into account the multilateral or bilateral instruments in force and the factual "inclination" of the alleged law-breaker - not to mention the allegedly injured State itself - can one determine whether the latter State has complied with the "exhaustion requirement". 81/a A rather clear-cut situation would be when the injured State can avail itself of a jurisdictional link providing for the possibility of a unilateral application to the ICJ. In such a case, it should be relatively easy to see that the injured State could not lawfully resort to countermeasures unless it had obtained either an interim measure order or a decision on the merits from the Court with which the law-breaking State has failed to comply. Even then, however, exceptions would have to be allowed if an urgent protective measure was indispensable to save human lives or suffering or to avoid an otherwise irreparable damage.

61d. Of course, there is a "legislative" way to reduce the variables, the freedom of choice, the consequential uncertainties and the further consequential risks resulting therefrom that countermeasures would be abused, - and abused especially, although not exclusively, to the detriment of the weak and the advantage of the powerful. The way to attain this objective would be to replace, more or less decidedly, provisions which merely refer to dispute settlement obligations deriving from sources other than a State responsibility convention - as is the case of article 12 (1) (a) - by provisions directly setting forth the obligation of exhaustion of given

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81/a All that can be said in general is that in most cases the first (and perhaps the only) means of settlement available is likely to be negotiation/consultation. In some cases there may be more or less advanced forms of conciliation or arbitration, infrequently susceptible of implementation by unilateral initiative. Only in very rare cases will there be available compulsory judicial settlement under Article 36 (2) of the ICJ Statute or equivalent instruments providing for a unilateral application to the Court. With the exception of the latter infrequent or rare situations, most cases would still involve, at least initially, a unilateral appreciation of the requirements of "availability" and "exhaustion".

procedures as a condition of resort to countermeasures. 81/b The more advanced the procedures adopted by the Commission, the more substantial the progressive development in the area of both State responsibility and dispute settlement. The injured State's "right" of unilateral appreciation would be reduced in direct proportion to the degree of effectiveness of the procedures expressly provided for in a State responsibility convention. The faculté of resort to countermeasures would also be curtailed in direct proportion thereto.

61e. The option suggested in the preceding paragraph surely represents the most realistic approach to attaining to the extent possible the theoretically ideal solution. This solution would obviously be to introduce in the draft articles - whether in Part Three or in Part Two itself - a more or less organic system of third-party settlement procedures ultimately leading, failing agreement, to a binding third-party pronouncement; - and at the same time so to amend draft article 12 (1) (a) of part Two as to make the lawfulness of any resort to countermeasures - except for the provisional, protective or cautionary measures envisaged in paragraph 2 of the same draft article 12 - conditional upon the existence of the said, binding third-party pronouncement. Within such a system, countermeasures in the sense of draft article 11 could be lawfully resorted to by State A against State B exclusively or almost exclusively in order to coerce a supposedly recalcitrant State B to comply with an arbitral award or an ICJ judgement finding State B to be in breach of one or more of its primary or secondary obligations towards State A. Although even then countermeasures would still be, in the absence of adequate institutional arrangements, the main instrument for ensuring compliance, resort to countermeasures would only follow a binding third-party pronouncement. Justice and equality would surely be better safeguarded. We would be therefore quite ready, if the Commission so wishes, to submit the draft articles that would be necessary to make such a breakthrough in the development of international law. 81/c

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81/b One could, for example, place on the allegedly injured State, an obligation to propose a binding or non-binding third-party settlement procedure and also to submit its claim to the third party once this procedure is agreed to by the allegedly wrongdoing State.

81/c Much to our regret, the conditions of such a development are unlikely to occur not only during the current United Nations Decade of International Law but at any time in the near foreseeable future.

61f. In preparing the present report, the Special Rapporteur felt that the solution considered in the preceding paragraph might not meet the favour of the majority of the Commission. While not excluding any step of progressive development in that direction, if the Commission were inclined to accent it, he thought of envisaging something less bold, although bolder than the 1985-1986 proposal. He thus proposes, as explained in the following subsection:

(i) to leave draft article 12 (1) (a) as it stands, namely as a provision referring to settlement obligations and not creating them;

(ii) to strengthen in Part Three the proposed non-binding conciliation procedure, submitted by the previous Special Rapporteur in 1985-1986, by adding arbitration and judicial settlement procedures without directly affecting, so to speak, the prerogative of the injured State to take countermeasures. This prerogative would be affected, as explained in paragraph 76 infra. only "in the mind", so to speak, of the injured State, in the sense that the injured State would know that the resort to a countermeasure exposes it to the risk of third-party verification of the lawfulness of its reaction.

The Special Rapporteur would welcome, however, any step that members of the Commission might suggest in the direction of the kind of more advanced solutions envisaged in the two preceding paragraphs.

B. The proposed three-step dispute settlement system

62. The solution we recommend for the consideration of the Commission consists of a binding third-party dispute settlement procedure which would come into play only after a countermeasure had been resorted to allegedly in conformity with draft articles 11 and 12 of Part Two, and a dispute arose with regard to its justification and legality. Following is a description of the three-step dispute settlement system resulting from the draft articles proposed for Part Three and the Annex thereto. 82/

1. The first step: conciliation

63. The first step should be a conciliation procedure similar to that envisaged in the 1986 proposal. Either party in the responsibility relationship, or alleged relationship, would be entitled to resort to such a procedure following the adoption of a countermeasure on the part of an

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82/ The draft articles are contained in Section 6.

allegedly injured State and in the presence of two primary and two secondary alternative conditions. The primary conditions are that (1) a countermeasure has been resorted to by an allegedly injured State and a dispute has arisen following a protest or other reaction on the part of the allegedly wrongdoing State; and (2) the dispute is neither settled within four months from the date when the countermeasure was put into effect, nor submitted within the same period to a binding third-party settlement procedure. 83/

64. The conciliation commission would be set up on the unilateral initiative of either party in conformity with the provisions of an Annex, similar in part to the one proposed in 1986 by our predecessor. In addition to the usual role of conciliation commissions, and without prejudice to the merely recommendatory nature of any final report to be issued, the conciliation commission would perform, in particular, the following tasks, on the basis of draft article 2 or the Annex:

(i) determining any question of fact or law which may be of relevance under any of the provisions of the draft on State responsibility, including, when necessary, fact-finding in loco;

(ii) ordering the suspension of any countermeasures resorted to by either party;

(iii) ordering interim measures of protection.

2. The second step: arbitration

65. Arbitration is to be envisaged in certain circumstances, according to draft article 3, namely:

(i) either in the case where the setting up or the functioning of the conciliation commission within three months from either party's application for conciliation has been prevented by any obstacle; or

(ii) in the case where, following the commission's report, no settlement has been reached between the parties within four months from the final report of the conciliation commission.

66. The arbitral tribunal would be appointed in conformity with the Annex. It would be called upon to decide with binding effect issues of fact or law which may be of relevance under any of the provisions of the draft articles on State responsibility within either 10 months of the date of its establishment or 6 months of the completion of the parties' written and oral submissions.

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83/ Binding third-party settlement procedures would include an arbitral tribunal or the ICJ.

The tribunal should be empowered a fortiori to exercise the functions expressly attributed to the conciliation commission under article 4 (see paragraph 64, supra).

3. The third step: judicial settlement

67. Subject to any further possibilities to be considered in connection with the regime of the delinquencies defined as "crimes of States" in article 19 of Part One of the articles on State responsibility, judicial settlement should only be envisaged, in our view, as a last resort in special cases under article 5. Two of these cases would be:

(i) the failure, for whatever reason, to set up the arbitral tribunal, unless the dispute is settled by other means within six months of such failure;

(ii) the failure of the arbitral tribunal to issue an award within the prescribed time-limit of either ten or six months.

In such cases, either party could unilaterally submit the matter to the International Court of Justice.

68. The competence of the ICJ should also be envisaged in the case of an excès de pouvoir or a violation of a fundamental principle of arbitral procedure by the arbitral tribunal. Either party would be entitled to refer such cases to the ICJ by unilateral application under article 6.

69. Like the arbitral tribunal, the ICJ should also be empowered to exercise, with regard to the case, any of the functions envisaged for the conciliation commission in paragraph 64 supra, which are not incompatible with the Court's Statute, although not necessarily contemplated therein.

69 bis. The time-limits suggested in the preceding paragraphs are merely tentative (see paras. 63 (i) and (ii), 65 (i) and (ii), 66 and 67 (i) and (ii) supra).

70. The relevant provisions, namely draft articles 1 to 6 of Part Three and the Annex, are to be found in Section 6.

C. Main features of the proposed solution: third-party settlement procedures as a way of correcting the negative aspects of the presently inevitable unilateral reaction system

71. The proposed system for dispute settlement is characterized by three essential features.

72. The main feature of the proposed system is that, failing an agreed settlement at any stage, it would, without significantly hindering the parties' choices with regard to other possible settlement procedures, lead to

a binding settlement of the dispute. Indeed, two limitations are placed on the parties' choice of settlement procedures. One limitation is that a unilateral application for conciliation under the conditions set forth in paragraph 63 supra can be made if the dispute which has arisen, following resort to a countermeasure, is not settled or has not been submitted to a binding third-party procedure within four months from the date when the countermeasure was put into effect. This deadline may be shorter than, and in that sense in contrast with, any longer period of time the lapse of which is envisaged in an agreement or an arrangement in force between the parties. It is felt, however, that the presence in the draft articles of a stricter rule, i.e. providing for a shorter deadline for the dispute to be settled or submitted to a third-party procedure, represents a reasonable, and as such acceptable, limitation of the otherwise excessively broad "free choice" rule of Article 33 of the Charter. 84/

72 bis. A second limitation on the parties' freedom of choice would reside, of course, in the very fact of envisaging a given conciliation procedure, namely a conciliation procedure to be initiated in conformity with draft article 1 of Part Three and the Annex, as proposed. This may not necessarily be in conformity with any standing or ad hoc arrangement, between the parties. Under any such arrangement, either party may be entitled, for example, to resort to a conciliation commission which is of a different kind, set up in a different way or endowed with different powers. Again, we feel that the rule we propose for Part Three of the draft articles on State responsibility should prevail over any less stringent rule which may be in force between the parties. This would better ensure the effective implementation of the articles on State responsibility.

73. The second essential feature of the proposed solution, and surely the most important to assess its feasibility, is the fact that the settlement procedures to be included in the draft articles would not be of such a nature as to directly curtail, in any significant measure, the injured State's faculté to resort to countermeasures against a State which the former State believes to be in breach of one of its rights. The lawfulness of the resort

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84/ A discrepancy of this kind may occur, for example, between the provision we propose and the conciliation procedure provided for in the Vienna Convention on the Law of Treaties (United Nations, Treaty Series, vol. 1155, No. 18232, p. 331).

to countermeasures remains, of course, subject to such basic conditions as are represented by the existence of an internationally wrongful act, the attribution of the act to a given State and the other conditions and limitations laid down in draft articles 11 to 14 of Part Two. The appreciation of the existence of the necessary conditions and of the conformity of a proposed countermeasure with the conditions and limitations set forth in draft articles 11-14 would remain in principle a prerogative to be exercised unilaterally, although at its risk, by the injured State itself, subject to any agreement to the contrary in force between the parties. The inclusion of the proposed three-step binding third-party settlement provisions as Part Three of the draft articles would not directly affect the prerogative or faculté exercised by the injured State when it decides to resort to countermeasures. The function of the proposed settlement procedures would merely be activated after the injured State has made such determinations. The purpose of the procedure would be to settle, in the timely and effective fashion described above, any differences between the parties in the responsibility relationship, including of course any questions of fact or law which may be relevant under any of the articles on State responsibility.

74. The latter point should be stressed beyond any possible misunderstanding. The "triggering mechanism" (mécanisme déclencheur) of the settlement obligations the parties would be subjected to under the proposed Part Three is neither an alleged breach of a primary or secondary rule of customary or treaty law nor the dispute that may arise from the contested allegation of such a breach. It is only the dispute arising from a contested resort to a countermeasure on the part of an allegedly injured State and possibly a resort to a counter-reprisal from the opposite side which triggers the dispute settlement system. The evaluation in the first instance of the existence of such a dispute, and consequently of the triggering conditions, will of course be made by the conciliation commission.

75. We need not expand on the obvious difference between the "triggering mechanism" represented by a dispute in our proposal, on the one hand, and the "triggering mechanism" represented by an "objection" in the 1986 proposal, on the other hand. The "dispute" is, in our view, a less problematic and in a sense more objective datum widely and authoritatively explored by the doctrine and the practice of international law. It will not escape the reader that the recommended system presents an advantage, as compared to the 1986 proposal.

Resort to a third-party procedure by an allegedly wrongdoing State which was the target of a countermeasure would not follow upon a mere objection to an intended and notified countermeasure. The third-party procedure could only be set in motion after the actual countermeasure was put into effect. The "conservatives" should be satisfied that, although it is surely more advanced and more effective in curbing abuses of countermeasures, the proposed solution would be, in practice, more respectful of the customary practices they seem anxious to preserve.

76. Another noteworthy feature would be the role that the proposed dispute settlement mechanism would perform within the framework of the State responsibility relationship. Although this mechanism would not directly preclude, as explained above, resort to countermeasures by an injured State at its risk, the availability of the system should have a sobering effect on an injured State's decision to resort to countermeasures. However, it would not be the kind of system for suspending unilateral action (dispositif de freinage de l'action unilatérale) that is found in other ILC drafts. 85/ We refer, for example, to the draft articles on the law of the non-navigational uses of international watercourses under which the implementation of a project on the part of a State may have to be suspended while a given procedure of consultation and/or conciliation is pursued. Within the framework of the proposed dispute settlement system for the State responsibility draft, the countermeasure would not be suspended at all, except by an order of a third-party body after the initiation of a settlement procedure. The only disincentive for the resort to a countermeasure that the proposed system would bring about would operate in the mind, so to speak, of the injured or allegedly injured State, whose authorities would hopefully be induced to exercise a higher degree of circumspection in weighing the conditions and limitations of a possible countermeasure.

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85/ Cf. H. Waldock, Second report on the law of treaties, (Yearbook ... 1963, vol. II, document A/CN.4/156 and Add.1-3, p. 36), cited in French by V. Coussirat-Coustère, infra, note 93, p. 40.

## SECTION 5

## THE COMMISSION'S APPROACH TO DISPUTE SETTLEMENT

### A. The practice of the Commission concerning the inclusion of compromissory clauses in its drafts

77. The ILC has not contributed very significantly to the development of the law of dispute settlement. With a few exceptions, the great majority of the codification drafts produced so far by the Commission contain imperfect compromissory clauses providing at most, in addition to negotiation and a general reference to Article 33 of the Charter, for binding recourse to non-binding conciliation. Stricter, more advanced commitments, which are usually relegated together with conciliation provisions to an annex or a protocol, are made subject to the separate acceptance or reservation of the contracting States. 86/

78. The most significant exception seems to be the Commission's draft on the law of treaties. 87/ The other exceptions are the 1975 Vienna Convention on the Representation of States in their Relations with International

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86/ It has also been noted that the compromissory clauses in question have provided the basis for the competence of the ICJ in only two cases and have not provided the basis for any arbitral procedure: see V. Coussirat-Coustère, "Le règlement des différends dans l'oeuvre de la CDI: vers une codification progressive?" in Etudes Apollis, Paris, Pédone, 1993, pp. 29-46.

87/ Article 66 of the Vienna Convention, supra, footnote 84, provides for not only non-optional compulsory resort to judicial settlement before the ICJ for any dispute concerning the application or the interpretation of article 53 or article 64 that is not settled by a commonly accepted arbitration, but also non-optional compulsory resort to a conciliation procedure. Although the implementation of the latter procedure is laid down in an annex, judicial settlement and conciliation are both clearly envisaged in article 66 as an integral, non-optional, automatically operative part of the Convention's procedural system to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty. The area of controversy covered by article 66 is, however, a rather narrow one. On the interesting history of this provision see, inter alios, R. D. Kearney, and R.E. Dalton, "The Treaty on Treaties", 64 AJIL (1970), pp. 495 et seq., particularly pp. 545-555; R. J. Dupuy, "Codification et règlement des différends: les débats de Vienne sur les procédures de règlement", AFDI, 1969, pp. 70-91; O. Deleau, "Les positions françaises à la Conférence de Vienne sur le droit des traités", ibid., pp. 20-23; S.E. Nahlik, "La Conférence de Vienne sur le droit des traités: une vue d'ensemble", ibid., pp. 42 et seq.

Organizations of a Universal Character 88/ and the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations. 89/ Mention should also be made of the draft on international watercourses 90/ and of the draft articles on the jurisdictional immunities of States and their property. 91/ Although in those two cases, the Special Rapporteurs suggested a more progressive

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88/ Article 84 provides as follows: "If a dispute between two or more State Parties arises out of the application or interpretation of the present Convention, consultations between them shall be held upon the request of any of them. At the request of any of the parties to the dispute, the Organization or the conference shall be invited to join in the consultations.". Article 85 (1) provides as follows: "If the dispute is not disposed of as a result of the consultations referred to in article 84 within one month from the date of their inception, any State participating in the consultations may bring the dispute before a conciliation commission constituted in accordance with the provisions of this article by giving written notice to the Organization and to the other States participating in the consultations.".

89/ A/CONF.129/15. Articles 65 and 66 of this Convention are very similar to articles 65 and 66 of the 1969 Vienna Convention on the Law of Treaties, supra, footnote 84. The main original feature of the dispute settlement system of the former is the advisory opinion procedure contemplated in article 66 (2) (b) and (e).

90/ The procedures which were envisaged by the successive Special Rapporteurs were a combination of negotiation, fact-finding and conciliation at the request of one of the parties. Failing conciliation, non-compulsory resort to arbitration or judicial settlement was provided for: see S.W. Schwebel, Third report on the law of the non-navigational uses of international watercourses (Yearbook... 1982, vol. II (Part One) document A/CN.4/348*, paras. 472-498); and J. Evensen, First report on the law of the non-navigational uses of international watercourses (Yearbook ... 1983, vol. II (Part One), document A/CN.4/367, paras. 200-231).

91/ S. Sucharitkul, Eighth report on jurisdictional immunities of States and their property Yearbook ... 1986, vol. II (Part One), document A/CN.4/396, paras. 43-48). In addition to negotiation, consultation and agreed arbitration or judicial settlement, the Special Rapporteur envisaged the possibility of a unilateral request for a conciliation procedure (articles 29-33). Draft article 31 contained an optional clause under which any signatory State could declare its acceptance of the compulsory jurisdiction of the ICJ for any dispute not settled under the means indicated in articles 29 and 30.

line, 92/ they were not followed by the Commission, whose attitude towards dispute settlement provisions remains a very guarded one. 93/

79. The Commission's general reluctance to consider bolder provisions in the area of dispute settlement in previous drafts seems to us to have been largely based on the following factors:

(a) the view of numerous members of the Commission that Governments would not accept any substantial obligations in the area of dispute settlement;

(b) a restrictive understanding of the Commission's task in the sense that the mandate to undertake the codification of a topic does not extend beyond the elaboration of the substantive rules relating to the subject, and thus any dispute settlement provisions are to be considered at the diplomatic conference or, at most, in the very last phase of the elaboration of the draft in the form of an annex thereto; 94/

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92/ Another example of this trend, although unconnected with the ILC, is the 1982 United Nations Convention on the Law of the Sea (A/CONF.62/122 and Corr. 1 to 11), Part XV of which sets up an elaborate non-optional third party settlement system. See, inter alios, E.L. Richardson, "Dispute settlement under the Convention on the Law of the Sea: a Flexible and Comprehensive Extension of the Rule of Law to Ocean Space"; and A. J. Jacovino, "Peaceful Settlement of Disputes in Ocean Conflicts. : Does UNCLOS III Point the Way?" in Contemporary Issues in International Law, Essays in Honour of L.B. Sohn, T. Buergenthal ed., Kihl-Strassbourg-Arlington, 1984, respectively at pp. 149 et seq., and 165 et seq. S. Ode expressed a not very optimistic view in his article entitled "Some reflections on the Dispute Settlement Clauses in the United Nations Convention on the Law of the Sea", in Essay in International Law in Honour of Judge Manfred Lachs, The Hague, 1984, pp. 645 et seq..: see also R.J. Dupuy and D. Vignes, A Handbook on the New Law of the Sea, 1991, vol. 1, pp. 777 et seq. and 1333 et seq.

93/ See especially V. Coussirat-Coustère, op. cit., footnote 86 supra.

94/ A typical example is the request that the Commission has repeatedly addressed to the General Assembly in recent years for the Assembly to authorize the Commission to study and prepare, in connection with the draft articles on the Code of Crimes against the Peace and Security of Mankind, a draft statute for an international court of criminal jurisdiction. Although it was obvious, as stated repeatedly by a few members, that an international criminal court would be an essential element for the proper implementation of the Code, the Commission has taken up the subject rather reluctantly, as now shown by paragraph 6 of General Assembly resolution 47/33 of 1992, and much too late.

(c) the view that in any case the rules on dispute settlement really belong to a different and in a sense separate area of law, namely the law of procedure, which should be dealt with separately on its particular merits;

(d) the view that the addition of ad hoc dispute settlement rules to a draft would complicate the substantive issues and reduce the chances that the results of the codification process would receive the approval of a sufficient number of Governments;

(e) the limited success of the Commission's efforts from 1949 to 1958 on the topic of arbitral procedure; 95/

(f) as regards the specific topic of State responsibility, the observation that the inclusion in the draft of advanced dispute settlement obligations, notably, of compulsory and binding third-party settlement procedures, would affect the violation of virtually any primary international obligation regardless of the subject matter. This, it is suggested, would make the adoption of a draft on State responsibility more difficult.

### B. Recent developments regarding dispute settlement procedures as evidence of a new trend

80. In the view of the present Special Rapporteur, the Commission should not be discouraged by any of these general or specific factors. No doubt, States are generally reluctant to accept advanced dispute settlement commitments,

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95/ While the Commission had recommended, in 1953, that a convention be concluded on the basis of its draft articles on the subject, the General Assembly first invited the Commission, on the basis of recent comments from Governments, to reconsider the draft and report again. When the Commission recommended that the resulting "Model Rules on Arbitral Procedure" be adopted, together with its report, by resolution, the Assembly declined to take the recommended action. It merely took note of the Commission's report and brought the draft articles on arbitral procedure to the attention of Member States for their consideration and use to the extent appropriate in drawing up arbitration commitments. According to Rosenne, The International Law Commission, 36 BYBIL (1960), pp. 150-151, there were three reasons for this outcome, namely: (1) the boldness of the Commission's approach in basing the draft on a concept of judicial instead of diplomatic arbitration, (2) a feeling that the draft relied too heavily on progressive development, and (3) the fact that the political climate of the United Nations was not ready for a further extension of the judicial settlement of disputes in place of diplomacy. We fail to grasp, however, the meaning of the expression "diplomatic arbitration".

particularly with regard to binding third-party procedures. 96/ The history of the law of dispute settlement records a considerable number of failures, notably the failure to establish a real permanent court in 1907 and the failure to achieve a general compulsory jurisdiction for legal disputes, as considered during the elaboration of the Statute of the PCIJ in 1919 and 1920. The implementation of the settlement provisions of the Covenant of the League of Nations, namely Articles 12-15 thereof, and of the General Act for the Pacific Settlement of International Disputes, adopted in 1928 and revised in 1949, were marked by only a few successes.

81. The adoption of the Charter, Chapter VI of which is mainly concerned with political (and "dangerous") disputes, did not represent any significant progress in the area of settlement procedures for legal disputes. While the role of the Security Council and of the General Assembly remain political in nature even for legal disputes,97/ the main procedures for the settlement of such disputes (arbitration, judicial settlement and fact-finding) appear to us to be buried, so to speak, under the "free choice" principle in Article 33. There have been no improvements in this situation, despite the efforts of some delegations in connection with the elaboration of the relevant parts of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV))98/ in which

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96/ See, inter alios, T. Franck, The Structure of Impartiality: Examining the Riddle of One Law in a Fragmented World, 1968, pp. 46 et seq. and passim; and R. Lee, A Case for Facilitation in the Settlement of Disputes, 34 GYBIL (1991), pp. 138 et seq.

97/ See, for example, D. Bowett, "Contemporary Developments in Legal Techniques in the Settlement of Disputes", 180 Haque Recueil, 1983, II, pp. 169 et seq.

98/ See mainly the proposal submitted by Dahomey, Italy, Japan, Madagascar and the Netherlands, the third paragraph of which states as follows:

"3. In order to ensure the more effective application of the foregoing principle:

(a) Legal disputes should as a general rule be referred by the parties to the International Court of Justice, and in particular States should endeavour to accept the jurisdiction of the International Court of Justice pursuant to Article 36, paragraph 2, of the Statute of the Court.

peaceful settlement was very poorly dealt with, 99/ and Principle V of the

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(b) General multilateral agreements, concluded under the auspices of the United Nations, should provide that disputes relating to the interpretation or application of the agreement, and which the parties have not been able to settle by negotiation, or any other peaceful means, may be referred on the application of any party to the International Court of Justice or to an arbitral tribunal, the members of which are appointed by the parties, or, failing such appointment, by an appropriate organ of the United Nations.

(c) Members of the United Nations and United Nations organs should continue their efforts in the field of codification and progressive development of international law with a view to strengthening the legal basis of the judicial settlement of disputes.

(d) The competent organs of the United Nations should avail themselves more fully of the powers and functions conferred upon them by the Charter in the field of peaceful settlement, with a view to ensuring that all disputes are settled by peaceful means in such a manner that not only international peace and security but also justice is preserved."

(Official Records of the General Assembly, Twenty-fifth Session, Suppl. No. 18 (A/8018), pp. 59-60).

99/ For example, with regard to General Assembly resolution 2625 (XXV), see the paper submitted by the representative of Italy to the 1970 session of the Friendly Relations Committee. In his opinion, the declaration that was being drafted was seriously weakened by the total disregard of the Committee's majority for the institutional aspects of the principles. In a document reproduced in the Committee's report to the General Assembly (ibid., p. 55) he stressed that:

"Among the seven Principles, some may be, or appear to be, merely normative in character, while the content of other principles is obviously normative and organizational at the same time. In any case, the organizational element could not be overlooked in the last quarter of our century without seriously prejudicing the impact of the normative content of the principles and perhaps their very existence.

... it would be dangerous to overlook the essential organizational aspects of the prohibition of the threat or use of force, of the principle of non-intervention, or of the principle of the peaceful settlement of international disputes. Not only the effective realization and general impact of these principles but their very existence and development depend in a high degree upon the procedure, instruments and machineries through which the rules stemming from those principles and inspired thereby are applied or enforced in inter-State relations."
(Emphasis in second paragraph added).

Helsinki Final Act, a particular disappointment in light of the articulate and highly meritorious proposal submitted to the Conference on Security and Cooperation in Europe (CSCE) by the Government of Switzerland. 100/

82. In recent years, there have been a number of encouraging developments, some of which were noted in our third and fourth reports. 101/ The 1982 Manila Declaration (General Assembly resolution 37/10, annex) represents a significant general policy development. Despite its character as a resolution and the programmatic rather than operative function of its provisions, that document contains two elements that the Commission should not overlook in the present context. The first element is the recommendation contained in paragraph 9 of section I to the effect that States should "consider concluding agreements for the peaceful settlement of disputes among them" and, more specifically, "should also include in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation and application thereof". Although this provision may appear obvious to the ordinary person, it represents a considerable development if one considers

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As regards, more specifically, the settlement of disputes, the same representative stated that he had frequently indicated the serious difficulties which, in his opinion, were inherent in the current wording of that principle [See, for example, Official Records of the General Assembly, Twenty-first Session, Sixth Committee, 939th meeting, para. 10 and ibid., Twenty-fourth Session, Sixth Committee, 1162nd meeting]. As recorded in the above mentioned report of the Friendly Relations Committee, he maintained that "the existing formulation 'reduces, in wording as well as concepts, the impact of Chapter VI of the Charter' and 'simply disregards whole articles or paragraphs of Chapter VI, not to mention the Statute of the International Court of Justice' and other international instruments" (ibid., Twenty-fifth Session, Suppl. No. 18, p. 59) and he called again the attention of the Committee to the proposal Italy had submitted together with Dahomey, Japan, Madagascar and the Netherlands (supra, note 98), adding that, failing acceptance of that proposal, "[w]ere the draft Declaration to maintain such a gap, serious damage might result in the progressive development of the law of peaceful settlement" (ibid. p. 60).

100/ See, in particular, R. Bindschedler, "La Conférence sur la sécurité en Europe et le règlement pacifique des différends", Il processo internazionale, Studi in onore Di Gaetano Morelli, 1975, pp. 101-118. The text of the Swiss proposal can be found in the Schweizerisches Jahrbuch für internationales Recht, vol. XXIX (1973), pp. 373-377.

101/ Third report on State responsibility, (A/CN.4/440* and Add.1*, paras. 52-62); Fourth report on State responsibility (A/CN.4/444 and Add.1-3 and Add.1/Corr.1, paras. 35-40).

that nothing of the kind is to be found in either the Declaration on Friendly Relations or Principle V of the Helsinki Final Act. The second equally significant element is the related provision contained in paragraph 11 of section I which provides that "States shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes". It was high time, in our opinion, that an international body denounced, at least by implication, the almost total ineffectiveness of the numerous arbitration, conciliation and/or judicial settlement treaties, the texts of which are collected together with a few less ineffective instruments in three well-known volumes. 102/ Further significant elements are to be found in paragraph 5 of section II according to which it is desirable that States: "(i) Consider the possibility of inserting in treaties, whenever appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties; (ii) Study the possibility of choosing, in the free exercise of their sovereignty, to recognize as compulsory the jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute; (iii) Review the possibility of identifying cases in which use may be made of the International Court of Justice". This section also provides that "Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States". Again, no such language is to be found in the Declaration on Friendly Relations or in the Helsinki Final Act.

83. A similar trend emerges from the Declaration on the Prevention and Removal of Disputes and Situations which may Threaten International Peace and Security and on the Role of the United Nations in this Field and the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (General Assembly resolutions 43/51 of 1988, annex, and 46/59 of 1991, annex).

84. A recent noteworthy development is the new CSCE project which has already reached the stage of a draft Convention on Conciliation and

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102/ M. Habicht, Post-War Treaties for the Pacific Settlement of International Disputes, 1931; United Nations, Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948, 1948; and United Nations, A Survey of Treaty Provisions for the Pacific Settlement of International Disputes, 1949-1962, 1966.

Arbitration. 103/ Even more remarkable are the concrete steps that a number of Eastern European States have been taking in order to radically reverse their formerly less progressive policies in this area (supra, note 81). We refer, in particular, to the acceptance by the former USSR of the ICJ's jurisdiction with regard to a number of international human rights instruments and the acceptance by the former Czechoslovakia and by Hungary of the judicial and conciliation procedures envisaged in article 66 of the Vienna Convention on the Law of Treaties. The increasingly favourable attitude towards providing for dispute settlement by the ICJ is another important sign of a new trend. Developments such as these indicate that the factor listed in paragraph 79 (a) supra, in our view, should not be overemphasized.

85. The factors set forth in paragraph 79 (b), (c) and (d) supra are very questionable. As regards the factor mentioned in subparagraph (b), the Commission should remember that it has been entrusted by the General Assembly with the technical task of working out the legal materials necessary for the implementation of Article 13 (1) (a) of the Charter. Once the parent body has made its political choice by entrusting the Commission with the elaboration of a draft, it is for the Commission to decide, on the basis of its technical expertise, ad referendum of course, the exact scope of the task to be performed in order to properly serve the United Nations and its membership. In the case of the preparation of a draft statute for an international criminal court referred to above (supra, note 94), the Commission's hesitation as to its competence resulted not only in unfortunate delays but also in a highly regrettable waste of resources. The Organization had to address itself to Member States for expertise that would otherwise have come from the Commission. Furthermore, an ad hoc formula had to be resorted to - a solution that is hardly commendable in the area of criminal law.

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103/ See, inter alios, V. Y. Ghébali, La Diplomatie de la Détente: la CSCE d'Helsinki à Vienne (1973-1989), Bruxelles, 1989, pp. 127 et seq.; H. Ruiz Fabri,"La CSCE et le règlement pacifique des différends", AFDI, 1991, pp. 296 et seq.; V. Y. Ghébali, B. Vukas, Krafft, B. Broms, J. Mrazek, A. Wasilkowski and L. Ferrari Bravo, in The Peaceful Settlement of International Disputes in Europe, Future Prospects, The Hague Academy Workshop, Daniel Bardonnet ed., 1991, pp. 529 et seq.; M. Hillgenberg, "Der KSZE - Mechanismus zur friedlichen Regelung von Streitfällen", GYBIL, 1991, pp. 122 et seq.; E. Decaux, La Conférence sur la Sécurité et la Coopération en Europe (CSCE), Paris, 1992, pp. 110 et seq.; and Ch. Leben, "La création d'un organisme CSCE pour le règlement des différends", RGDIP, 1991, pp. 857-880.

86. With regard to the factors listed in paragraphs 79 (c) and (d), there is nothing in the distinction between substance and procedure that would require that they be dealt with separately in all circumstances either in national or international law. As regards international law, the opposite actually seems to be true. The general dispute settlement instruments, whether bilateral or multilateral, have not proved to be, as noted above, very effective. They are interesting materials for studying and teaching the various means of and procedures for dispute settlement and combinations thereof, but they are not the most frequently used in practice by litigating States. The same must be said of the technically praiseworthy ILC Model Rules on Arbitral Procedure which is nothing more than a model for States to use once they have decided to resort to arbitration. The more useful dispute settlement mechanisms are the ones commonly referred to by lawyers as "compromissory clauses", namely, the settlement clauses attached to specific international treaties (including an increasing number of multilateral ones), and providing for means of settlement of any dispute arising out of the application or interpretation of the treaty. These are precisely the kind of settlement mechanisms which the General Assembly in its Manilla Declaration encouraged States to adopt (resolution 37/10, annex) and which are sometimes, and should be more frequently, embodied in the draft codification conventions that it is the Commission's task to recommend, through its parent body, to the community of States.

### C. Part Three of the draft on State responsibility as a matter of progressive development in the law of dispute settlement

87. Coming now to the reluctance of States as regards our specific topic (paragraph 79 (f) supra), the inclusion of dispute settlement provisions is in our view particularly appropriate for the draft on State responsibility. Unlike most codification conventions, the draft is already to include a number of important articles on matters other than substance. We refer to the articles presented last year on the conditions and limitations relating to the lawful resort to countermeasures as a reaction against an internationally wrongful act and the uncooperative attitude of the law-breaking State, articles which are presently before the Drafting Committee. Mutatis mutandis, these provisions are instrumental in nature and perform the kind of function intended for the rules in Part Three providing for dispute settlement procedures. The presence in the draft of a Part Three, including specific

dispute settlement articles, seems thus to be perfectly consistent with the nature of some of the key provisions of Part Two of the draft articles.

88. It is true, of course, as noted inter plurimos by our predecessor, that the insertion of dispute settlement provisions in a draft concerning the consequences of the infringement of international obligations would cover a wide range of matters by providing for a duty to submit to binding third-party procedures the initiation of which would depend on a unilateral decision of either party. This is not, however, as insurmountable an obstacle as may seem at first sight. Two main considerations should be kept in mind.

89. First of all, the disputes that would be covered by this procedure are as follows:

(a) legal disputes involving the interpretation or the application of any of the articles on State responsibility, a very broad but not unlimited area;

(b) legal disputes, as described in paragraph (a), arising as a consequence of countermeasures or counter-reprisals resorted to by parties in an international responsibility relationship.

90. Secondly, but most importantly, the draft on State responsibility already implies, since the draft articles proposed last year have been referred to the Drafting Committee, the subjection of any State as a prospective law-breaking party to unilateral initiatives which are certainly less palatable than subjection to the unilateral initiation of a third-party conciliation, arbitration or judicial settlement procedure. Even assuming that States, in the midst of the United Nations Decade of International Law, would view third-party settlement obligations as an intolerable burden, the Commission should at least invite them to consider further whether allowing a general prerogative (faculté) of resort to countermeasure without an adequate check would not be even more intolerable.

91. There is yet another general reason for the Commission to include more advanced dispute settlement provisions in the draft on State responsibility. The Commission's hesitation to propose more decisive steps towards a third-party dispute settlement system irrespective of the possible reluctance of States to accept it is no doubt understandable in view of the broad scope of the draft. However, this very factor should serve as an encouragement to the Commission to seriously consider including such a system in the current draft. This for two good reasons. First of all, the Commission would thus bring an

essential correctif to the most unpalatable features of countermeasures, such correctif being the only equitable and effective way to ensure that an injured State, whatever its power, comply with all the conditions and limitations placed by the draft upon its faculté of unilateral reaction. Secondly, the inclusion of an effective dispute settlement system in the draft would necessarily enhance the observance of any rule of international law, including any past or future codification convention.

91 bis. Experience shows that the documents on dispute settlement most commonly referred to, such as Chapter VI of the Charter, the Friendly Relations Declaration or even the Manila Declaration, as well as the Charter of the Organization of American States (OAS), the Pact of Bogotà and the Charter of the Organization of African Unity (OAU) and its Protocol, are too vague to provide any effective protection against infringements of international obligations. There is therefore not much point in undertaking any further efforts to progressively develop dispute settlement procedures of a general character in light of the numerous ineffective general dispute settlement treaties. It would be more appropriate to engage, in the context of the draft on State responsibility, in a substantial progressive development of dispute settlement procedures by providing for a more effective compromissory clause. It would indeed be very difficult to imagine a better opportunity to take a step forward in the form of a positive development in the law of dispute settlement than the occasion offered by the adoption of a draft convention which, while regulating the present system of unilateral reaction and thus expressly sanctioning a practice of customary law involving many negative aspects, would at the same time set in place adequate controls over the faculté of resort to countermeasures - a faculté which would otherwise inevitably expose the weak and vulnerable, namely the great majority of the members of the inter-State system, to the risks deriving from the factual inequalities of States.

92. In conclusion, the draft on State responsibility provides an excellent opportunity for the United Nations membership to make a significant contribution to the development of the law of dispute settlement. We submit, with respect, that it would be a grave error for the ILC to miss such an opportunity. We further hope that an improvement in the area of dispute settlement procedures will considerably enhance the prospects for real

progress in terms of the implementation of article 19 of Part One of the draft articles.

93. We are therefore inclined to believe that the Commission should reverse its tendency to narrowly interpret its competence with respect to dispute settlement procedures and to overemphasize the reluctance on the part of Governments to accept more advanced dispute settlement commitments. We submit that the Commission should consider the matter in as innovative a spirit as possible and address it with full confidence in its technical skills and expertise. In this connection, the attention of Governments should be drawn to the advantages that a well-conceived set of draft articles for Part Three would have on the development of the rule of law in the inter-State system.

94. Of course, the effort of the Commission with regard to dispute settlement must go beyond its codification function which is generally understood to consist in "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine". The task to be performed is instead one of progressive development, as envisaged in Article 13 (1) (a) of the Charter and in articles 1 and 15 to 24 of the ILC Statute. In accordance with the relevant provision of the Statute, this task entails the elaboration of "draft conventions on subjects, which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". 104/ Surely, progressive development, originally distinguished from strict codification in the Statute (and its travaux préparatoires), was rightly considered by the Commission to be just one of the two inseparable aspects of codification in a broad sense. But the "early abandonment"105/ of the distinction and the notion that the two aspects of the Commission's task are merged, so to speak, in the concept of codification lato sensu do not mean that the Commission's role in the area of progressive development is diminished. On the contrary, this role is far more important, in our view, than the mere "formulation and systematization"

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104/ The quoted phrases are taken from the definitions of "codification" and "progressive development" as they appear in article 15 of the ILC Statute for the purposes of articles 16-24 thereof.

105/ Sir Ian Sinclair, The International Law Commission, 1987, p. 46 and passim.

of existing rules. 106/ The "early abandonment" of the distinction between the two functions was merely prompted by the fact that, in many areas, it is difficult - and furthermore not indispensable - to distinguish between these two aspects of the Commission's work. Furthermore, while certain areas call for only strict codification in a narrow sense, namely enhancing the certainty of the law by detailing it and writing it down, other areas of international relations call for new rules to be elaborated by way of progressive development. It is clear that dispute settlement is precisely one of the latter areas in which it is imperative that creative work be carried out by the Commission with the necessary determination. 107/

95. In submitting to the General Assembly the result of its effort, the Commission should not hesitate, we respectfully urge, to call the attention of the United Nations membership to the indisputable fact that "[t]he failure of the international community to develop a third-party law-making [i.e., for our purposes, adjudication] comparable to that of the national community may well prove to be the fatal error of our civilization". 108/ The proposals

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106/ We might be prepared to agree with Brierly's view that "codification [in a narrow sense], is, or should be a scientific task ... of ascertaining and declaring the law which already exists, and which is binding on States whether they approve its content in every detail or not. It is true that it must necessarily involve the correction of the main [?] inconsistencies in the existing rules ... and the filling of lacunae ..., and the distinction between legislation and codification [in a narrow sense] can, therefore, not be a strictly scientific one. Nonetheless the distinction is correct in a broad sense; the main purpose of codification [in a narrow sense] is not to find rules which are acceptable to the parties, which is inevitably the first consideration in a convention, but to state what the rules already are" (quoted in H.W. Briggs, The International Law Commission, 1965, pp. 131-132). The most significant part of the Commission's task is therefore progressive development. The pre-eminence of the development of the law seems to be also recognized by R.Y. Jennings, The Progressive Development of International Law and its Codification, XXIV BYBIL (1947), pp. 300-329.

107/ On the role of the ILC with regard to progressive development, especially from the viewpoint of the exigencies of the "Third World", we recall the UNITAR Study on the International Law Commission: the Need for a New Direction, UNITAR, 1981; and T. Franck and M. El Baradei, "The Codification and Progressive Development of International Law: a UNITAR Study on the Role and Use of the ILC", 76 AJIL (1982), pp. 630-639.

108/ T. Franck, ibid., p. 46 et seq. and passim. The author's reflections on the bloodshed caused by the wars of the Twentieth Century apply with equal force to the negative consequences of the practice of any kind of unilateral coercive measures.

contained in the preceding section are far less ambitious and do not even attempt to fill such a gap. They do not suggest the establishment of machinery for the creation of new law. We only advocate the establishment of the machinery strictly indispensable in order to correct, by the mere application of existing law, the most preoccupying aspects of the existing system of unilateral countermeasures. International lawyers, in particular, should play a more active role in promoting such a development. They cannot escape that responsibility by resorting to the outdated argument that Governments will not accept more adequate settlement commitments. Let Governments take responsibility for accepting or rejecting them. 109/

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109/ It is perhaps appropriate to recall that the most vigorous (and justified) criticisms of countermeasures referred to in the preceding sections of the present report came from the participants in the debate of the Sixth Committee at the forty-seventh session of the General Assembly in 1992 whose voice is particularly authoritative first because of their political role as government representatives and second on account of their expertise in international law. Those representatives expressed the views of the Governments, which the Manilla Declaration addresses itself to and which are the very same entities that drafted and adopted that declaration. It must be stressed that the negative aspects of countermeasures denounced in 1992 are additional arguments in favour of implementing the Manilla Declaration.

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